

Washington Law Review

Volume 60 | Number 2

4-1-1985

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Robert Birmingham

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Recommended Citation

Robert Birmingham, *Notes on the Reliance Interest*, 60 Wash. L. Rev. 217 (1985).

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NOTES ON THE RELIANCE INTEREST

Robert Birmingham*

The topic is Contract Damages. The interests are defined by how we protect them. Imagine a breaching promisor. We protect the *reliance interest* of the promisee by requiring the promisor to put her in a position as good as she would have been in had the parties not contracted. The other interests are the *restitution interest*, which we protect by requiring the promisor to give back what the promisee has given him; and the *expectation interest*, which we protect by requiring the promisor to put the promisee in a position as good as she would have been in had he kept his promise. In a sense the reliance interest is intermediate between the other two interests. A promisee might rely otherwise than by giving the promisor what a restitutionary remedy will make him give back, and she enters a contract expecting to be better off by doing this than she would be by not doing it (unless she would expect, if she did not enter this contract, to enter a contract similar to it). The definitions of the interests are by Fuller but the second *Restatement* adopts them.

My paper is mainly loosely connected reviews of two other papers about the reliance interest. I talk in Part I about *The Reliance Interest in Contract Damages*, by Fuller and Perdue.¹ This paper defined the interests and urged us to attend particularly to the reliance interest. Goetz and Scott, who wrote the other paper, invite us to extract from *The Reliance Interest* the insight that “reliance is the organizing principle that supports all contractual obligation.”² *The Reliance Interest* is our most significant article on contract law. (We rightly resist adding ‘alas’, as in Gide’s reply “Hugo—helas!” to the question ‘Who was the greatest poet of the nineteenth century?’) Macneil speculates that *The Reliance Interest* “may well have had more influence in changing American contract jurisprudence in the past 40 years than any other single article or book.”³ The competition is formidable. Conceivably Macneil discounts Corbin’s treatise on the ground that its influence is an instance of backward causation. Corbin published it late in his career (1950–51), long after he had established its ideas.⁴

* Professor of Law, University of Connecticut.

1. Fuller & Perdue, *The Reliance Interest in Contract Damages* (Pts. 1 & 2), 46 YALE L.J. 52, 373 (1936–37) [hereinafter cited in the text as *The Reliance Interest*].

2. Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1291 n.61 (1980) [hereinafter cited in the text as *Enforcing Promises*].

3. I. MACNEIL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS: CASES AND MATERIALS* 98 (2d ed. 1978).

4. Gilmore called Fuller’s article “remarkable.” G. GILMORE, *THE DEATH OF CONTRACT* 56 (1974).

I talk in Part II about *Enforcing Promises: An Examination of the Basis of Contract*, by Goetz and Scott. Goetz and Scott consciously build on Fuller's idea but they disregard the ethical foundation of it in a way I will discuss. They defend the thesis they attribute to Fuller: protecting the reliance interest is the objective of contract law. Goetz and Scott are methodologically more sophisticated than Fuller. Where Fuller applied Aristotelian philosophy and folk economics they use indifference curves.⁵ Hudec remarks of *The Reliance Interest* that its "analysis has served a generation of contracts scholars as a model of how to think about contract law generally."⁶ It certainly has done this but the generation of contracts scholars is not quite the current one.

This is a critical study, its affirmative aspect largely implicit. But Parts I and II share two theses (A and B)—or a weak and a strong form of one thesis. A: The expectation interest counts *too*. Evidently this is true but it takes through Part II to bring it out. B: *Only* the expectation interest counts. B is maybe less interesting because it turns on taxonomy (we identify a transaction as uncontractual if we purposely protect reliance on it). But the law is prettier if B is true. To get clear about A/B, recast the thesis *Enforcing Promises* attributes to Fuller and defends as C: *Only* the reliance interest counts.⁷ Apparently then 'counts' is interchangeable with 'is an organizing principle of contract law', 'is an objective of contract law', etc. Nothing is novel about A and B. Goetz and Scott are trying to refute A by asserting C and they think Fuller was too. Perhaps; but by a better reading Fuller was more circumspect and tried rather to refute B by arguing *for* the other side of A: The reliance interest counts *too*. E.g., Fuller breaks off advocating the reliance interest to tell us the expectation interest in charitable contributions is *rightly* protected without regard to the promise having been relied on.

Part I has two jobs: be friendly to A/B; explain why Fuller was not more so. The problem was the reliance interest was theoretically too central to Fuller's analysis to be protected most of the time by tort law. So he did not make "the assumption, so frequently made, that any liability explicitly directed toward the reimbursement of reliance must rest on 'tort' rather than 'contract'."⁸ The reliance interest was too central to Fuller's analysis for two reasons. He was unequipped to work out the economics of the expectation interest—he invoked Aristotle instead of Marshall—so if deprived of the reliance interest he would have had no theory. Coincidentally Williston and

But he called Corbin's treatise "the greatest law book ever written." *Id.* at 57. Generally, Gilmore graciously said that things are better than they are.

5. See generally Samuelson, *Economics in a Golden Age: A Personal Memoir*, in PAUL SAMUELSON AND MODERN ECONOMIC THEORY 1, 6 (E. Brown & R. Solow eds. 1983).

6. Hudec, *Restating the "Reliance Interest,"* 67 CORNELL L. REV. 704, 733 (1982).

7. Goetz & Scott, *supra* note 2, at 1291 n.61, 1321-22.

8. Fuller & Perdue, *supra* note 1, at 409.

Corbin in their compromise over section 90 of the *Restatement* corrupted his data base so he started off calling too many promises 'contracts'.⁹

I have organized Part I like this. Part IA is an annotated outline of Fuller's data. I start here because Fuller's paper is classically inductive, i.e., Fuller argued that the cases categorized his way make more sense. The annotations suggest this is anyway not self-evidently so. Parts IB and IC respectively address promises bargained for and gratuitous promises. Fuller taught us the expectation interest in bargained-for promises gets protected in the course of protecting the reliance interest. Part IB says the dependency goes the other way. Part IC begins with Gilmore's story of Corbin's enthusiastic and Williston's grudging invention of *Restatement* section 90, then assimilates this section to tort law. Part ID suggests that Fuller discounted the expectation interest because his reading Aristotle left him unprepared to get the point of protecting it.

The ideas in Part I are big (and vague). One gets embarrassed by them. Part II somewhat redemptively makes mostly narrow technical points. *The Reliance Interest* was published in 1936; *Enforcing Promises* in 1980. That the forty-four years intervening have made a methodological difference to scholarship partly explains the difference in levels of the analyses.

The technical analysis is largely to the effect that Goetz and Scott get wrong results from or by interpreting their geometry. Or better, Goetz and Scott get right results but not enough of them. To correct what they say, I use what Goetz has published elsewhere, but has applied differently.¹⁰ So in a way I am redirecting their insights, not having new ones. But our differences, despite being technical, are worth inquiring into, albeit everybody has met more exciting arguments. Benefit side: *Enforcing Promises* depends on being technically right. Thesis C—that only the reliance interest counts—is sensible according to its self-imposed criterion only if protecting just the reliance interest (with some latitude about what counts as this interest) provides an economic optimum. Goetz and Scott teach us to calculate this interest a new and excellent way. If my analysis is right, however, protecting the interest calculated this way is sub-optimal.

Perspective is also important. For instance, Whitehead reminds us: "After all, even during the worst period of the decline of Rome the barbarians were enjoying themselves."¹¹ The perspective from which *Enforcing Promises* is wrong (if it is wrong)—that of the theory of economic policy—is itself valuable.

Part IIA derives beneficial and detrimental reliances following Goetz and Scott. Part IIB explains their optimal damage rule based on these reliances.

9. *Id.* at 63–66.

10. C. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS 299–303 (1984).

11. A. WHITEHEAD, ADVENTURES OF IDEAS 7 (1933).

Goetz and Scott celebrate the equivalence of this rule and the Hand test in tort law. Part IIC finds the rules governing intentional tort, not negligent tort, more nearly equivalent to the optimal damage rule. Part IIC also discusses how Goetz and Scott use 'reliance' in a way related only tenuously to Fuller's use of it. Part IID mostly criticizes the rule of *Enforcing Promises* as economically sub-optimal. It argues that if we extend *what* Goetz and Scott say, if we take it as true and investigate the consequences of it, then we end up reinventing contract pretty much as we have it, not as they want it to be. There is something of Russell's argument against ordinary-language physics here: 'If it is true it is false, therefore it is false'.

We should judge a damage rule for breach of contract by whether it performs three functions well or badly: compensates the promisee; gets the number of promises made right; and gets the number of promises kept right. The first function mattered most to Fuller; Goetz and Scott worry about the second; I am interested in the third. Parts IIC and IID respectively talk about accomplishing (or failing to accomplish) the first two and then simultaneously all three of the functions.

Finally, which of A/B/C is best matters although the question is abstract. This area of contract law has been unstable since Fuller published. Fuller criticized the parts of the first *Restatement* about remedies effectively enough that not much of them survives. The *Restatement* as it is currently written repentantly embraces Fuller's catalogue of interests, likewise his permissive attitude toward protecting them.¹² It is (perhaps consequently) usually unable to tell judges what to do. This kind of change in the current *Restatement* has been hailed as a desirable shift from rules to standards¹³ but is still an evil thing.

I. FULLER AND PERDUE

A.

Fuller's thesis (stated so as to equivocate between B/C): There is a reliance interest distinct from the expectation and restitution interests. Courts do protect it some and ought to protect it more. Fuller came this close to C taken independently of B: "We might easily base the whole law of contracts on a fundamental premise that only those promises which have been relied on will be enforced. As the chief exception to this principle we

12. See R. SUMMERS, LON L. FULLER 133 (1984).

13. See generally Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785 (1982).

should have to list the bilateral business agreement.”¹⁴ The modal operator ‘might’ makes a difference. Also, the class of contracts except the bilateral business contract is like the class of divine beings except God.

The thesis has really only two parts. Fuller’s existence claim (‘there is . . .’) depends on what courts have done or should be doing. The ‘or’ accomodates alternative descriptive and normative readings of Fuller’s thesis. We posit interests only if they explain things. Fuller argued that we can make sense of the pattern of decided cases and say something useful about how undecided cases should be decided by positing a reliance interest. For B/C to work requires that courts protect the reliance interest *as such*. The impact of ‘as such’ is reasonably evident intuitively although tricky to articulate. (Analogously: “An iron filing can be said to respond to a green magnet *as a magnet*”; however, the filing “clearly” does not “respond to the magnet *as green*, for it would respond in the same way if the magnet were of any other color.”¹⁵) Examples: Contract law protects not as such, but merely incidentally, fractions of the expectation interest, or protected interests of persons whose names begin with ‘A’, etc. Nevertheless, it is not exactly that the reliance interest needs to be protected under a particular description: e.g., ‘the reliance interest’. Part of what made *The Reliance Interest* outstanding is that the authors were (in some sense) locating a reliance interest for the judges, not just reporting that the judges already had found it.

We may identify two separable uses of the reliance interest. A court may decide to give relief because a promisee has relied but determine the quantity of this relief independently of the reliance. A court may decide to give relief independently of the reliance but determine the quantity of this relief by the quantity of the reliance. As does Fuller,¹⁶ we will refer to the uses in terms of ‘motive’ and ‘measure’ of recovery respectively. The two uses have a logical affinity for each other, so something is unresolved if a court employs one without the other. Fuller was fortunate to get either in his illustrative cases.

First, we must inspect the evidence *The Reliance Interest* adduces for there being a reliance interest or for its being protected. The article was published in two parts (together the parts run over ninety pages). Part 1 supplies most of Fuller’s theory. Part 2 is more than an appendix of case law supporting the argument of part 1. Nevertheless it has that feel. It assembles seven categories of what it calls “situations in which judicial intervention has been (or in our opinion, should be) limited to a protection of what we

14. Fuller & Perdue, *supra* note 1, at 70.

15. Sellars, *Mental Events*, 39 PHIL. STUD. 325, 335 (1981).

16. Fuller & Perdue, *supra* note 1, at 66–71.

have called the reliance interest.”¹⁷ In Part IA of this article I briefly review the categories using Fuller’s captions for them. Fuller was young and hungry when he wrote *The Reliance Interest*. This is evident in the richness of the material in the categories. I am going to try to indicate this richness while being attentive to my own expository pace.

The order of the categories turns out to be significant. This is: 1) expectancies uncertain; 2) *Flureau v. Thornhill*, etc.; 3) frustration; 4) Statute of Frauds; 5) family agreements; 6) section 90; 7) deceit. The order goes from the least to the most questionably contractual. Category 1 is about promises belonging to ordinary bargains; category 7 about relied-on nonpromises.

Cases Where the Requirement of “Certainty” Excludes Damages Measured by the Expectation Interest

One cannot get one’s expectation interest protected if one cannot establish it. This seems to be about the burden of proof. And where one cannot establish one’s expectation interest, if one can establish one’s reliance interest one can get that protected, given the promisor’s breach, etc. This much seems straightforward. This use of the reliance interest appears merely mensural. I suggest later it is not even fully that.

Fuller said more is going on. The reliance recovery is usually between the expectation recovery and nothing. Courts require certainty where they think a plaintiff would otherwise get too much. In that situation, she gets reliance damages, i.e., less. Then, a use of the rule requiring certainty is to reach a result desired for other reasons than those on which it, by its terms, depends. Fuller said the rule is, in this respect, similar to the rule of *Hadley v. Baxendale* except that it can be used when the promisee has told the promisor how she is going to be hurt. This is plausible—we all think it true—but to establish it we would have to assess situations in cases by the certainty and excessiveness of the expectation interests in the promises and calculate which characteristic better predicted results. The terms ‘certainty’ and ‘excessiveness’ have not been authoritatively defined. Fuller did not do this, nor has anybody else done it.

It is hard to evaluate what Fuller said here. Underlying his position is the legal realistic premise that judges manipulate doctrine to get a result they want. Well of course they do. And Fuller should not be blamed just for sharing the attitudes and forms of argument of his day. Imagine, though, we buy *everything* Fuller said. All we get is a reason to protect what we might call the ‘modest expectation interest’. *Hadley* similarly wants to protect

17. *Id.* at 373.

expectation interests selectively. The upshot is that judges by requiring certainty are protecting the reliance interest only incidentally—i.e., protecting it because it is intermediate and available.

Fuller told us that requiring certainty also results from “a desire for an easily administered rule”; and where this “impulse is the controlling one, the reliance interest is often employed as a surrogate for the expectation interest.”¹⁸ Many rules are easily administered: e.g., ‘Pick the taller litigant’. Thus, saying just this does not explain anything. But if one says a bit more, one gets a good doctrinal explanation for using the reliance interest in these situations. I do this in Part IB.

Cases Where Damages Measured by the Expectancy Would Impose an Undue Burden on the Promisor

These cases mostly follow *Flureau v. Thornhill*,¹⁹ by which the vendor of land need not compensate his vendee for loss of her expectancy if he cannot make out title, but has tried. The ‘undue burden’ language here is misleading: the burden is in general not undue, and “the life of the [rule] has not been logic: it has been experience.”²⁰ Not just the restitution interest, but the reliance interest too, is protected under *Flureau*. But the case is old; the rule has always been a minority position in America; and it is dying out.

There is something else too. A lot of what I am going to say turns on keeping separate promises that are parts of bargains (promises supported by consideration—i.e., falling under *Restatement* section 75) and other promises (mainly under section 90). But ‘bargain’ is going to refer ideally to exchanges of widgets for money—nobody gets upset about losing widgets. A sale of land in eighteenth-century England evidently was by bargain. But the bargain was too distant from paradigmatic bargain, i.e., it was sullied by noneconomic concerns, because land was special. It was too closely connected to status. A family was defined by its land. Thus Blackstone (a judge in *Flureau*, and its reporter) wrote Book II of the *Commentaries* as he did. *Flureau* itself looks commercial. Nevertheless it was decided against a background of solicitude for real property. This solicitude conceivably infected its results.

Cases Where Performance of the Contract is Interfered with by External Circumstances

These cases are, most importantly, the impossibility/frustration cases. Fuller says there are “no American or English cases expressly recognizing a

18. *Id.* at 376.

19. 96 Eng. Rep. 635 (C.P. 1776).

20. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

recovery” by a party to a frustrated contract “measured by the reliance interest”—but that there should be.²¹ Meanwhile, he finds the reliance interest covertly recognized. I.e., there is “much reason to suspect that in some” frustration cases “the reliance interest has received protection under an alias [‘restitution’].”²² So the court may *invent* something the promisor receives that is equivalent in value to what the promisee gives up.

Fuller’s language here is argumentative: “. . . reasonable to suppose that the primary object of the court . . . was to reimburse the plaintiff for his reliance on the contract”; “. . . cannot remove a suspicion that their decision was influenced predominantly by the desire to reimburse a plaintiff who had made expenditures in reliance”; etc.²³ Fuller insightfully suggests that reliance gets called ‘restitution’, but otherwise misses what is going on.

By the time the parties get to court, there is no contract. (This is a formal result, and one’s impulse is to apologize for it; occasionally though, formal results do not mislead.) Hypothetically, neither promisor nor promisee has done anything wrong. They ordinarily have a joint loss relative to where they would have been had they not contracted. This loss *must* come from reliance on the contract by one or both the parties. ‘Let the loss lie where it falls’ does not have much appeal; the intuitively just disposition is Solomon’s: divide the loss. A student note quoted in the 1981 edition (by Eisenberg) of Fuller’s casebook tells us to do just this: “If reliance loss is left where it falls, who incurs the loss and how much is incurred are as fortuitously unfortunate as the fact that the contract cannot be performed”; “since the fortuity of actual reliance expenditures provides no generally applicable guides for the placement of loss, it seems fairest to split loss according to equal innocence.”²⁴

Contracts Imperfect in Expression or in Legal Effect

These are mainly contracts falling within the Statute of Frauds. We do not protect the expectation interest; if we did, the Statute would accomplish nothing. We protect the restitution interest as a matter of course; in formal terms actions for restitution are not on the contract, albeit the existence of a contract is what makes it right to require that what has been given be given back. Fuller would like us to protect the reliance interest too. A few cases do this; of course a few cases do anything.

21. Fuller & Perdue, *supra* note 1, at 380.

22. *Id.*

23. *Id.* at 381–82.

24. Note, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054, 1060 (1960), quoted in L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 875, 876 (4th ed. 1981).

Fuller agrees most cases manifestly in point go the other way. Probably proportionately more of them went that way then than now. But he asks us to consider cases other than those “in which the problem is made explicit.”²⁵ I.e., part performance takes a contract out of the Statute. We usually say the evidence of the contract generated by part performance makes fraud unlikely. Fuller says: “What this notion means in its broadest form is simply that when an oral contract has been seriously relied on, it becomes enforceable.”²⁶ To adjudicate between these competing justifications, we would need to find a case where reliance was significant but not evidentiary (if this is logically possible) and consider how it came out. Anyway (as Fuller recognizes), when the contract becomes enforceable, the court protects the expectation interest. He explains that the court is trying to protect the reliance interest, but protects it awkwardly. Here too he indicates that, in other circumstances, where there is not part performance, courts, although purporting only to protect the restitution interest, nevertheless protect the reliance interest by defining ‘benefit’ broadly.

Fuller’s ideas are good but it is hard to get our intuitions around them. If we suppose the contract was made, that is, if the issue is nakedly whether or not to apply the Statute of Frauds, we try to figure out how not to. What stops us at protecting the restitution interest or, less probably, the reliance interest, is not that we think the promisee deserves only this. We simply do not see our way clear doctrinally to give her more. The inclination to protect the reliance interest is parasitic on the inclination to protect the expectation interest, as far as desert, as distinct from doctrine, goes.

Fuller appears here to argue against himself. He wants the reliance interest to get protected as part of contract law, but comprehends what keeps it from getting protected *at all* in the vicinity of the Statute of Frauds is just its being taken as contractual. Symptomatically, if somewhat desperately, he celebrates the Connecticut court’s having “found no difficulty, and apparently experienced no juristic pain, in conceiving of” a suit for reliance damages “as based on a rescission of the contract.”²⁷ The tension abates if by talking reliance one is talking tort.

Bargains Relating to a Subject Matter Noncommercial in Nature

Thus the nonparadigmatic (noncommercial) bargains. Frequently it is touch and go whether a court will find a contract (*Hamer v. Sidway*²⁸) or not

25. Fuller & Perdue, *supra* note 1, at 390.

26. *Id.*

27. *Id.* at 388.

28. 124 N.Y. 538, 27 N.E. 256 (1891).

(*Balfour v. Balfour*²⁹). When nevertheless it does, it usually protects the expectation interest. Fuller claimed a court finds a contract and thus protects the expectation interest depending on whether the promisee has relied on the promise.

We might prove this claim by citing pairs of similar promises, one member relied on and enforced, the other unrelayed on and unenforced. Fuller cites just one case: *Hamer*. As Fuller interprets it, the nephew "denied himself" alcohol, nicotine, etc. "in reliance on a promise."³⁰ One must read 'denied' as 'did not use' and 'in reliance on' as 'knowing about'. The report of the case contains nothing indicating the plaintiff behaved differently than he would have if the uncle had not promised. The defendant tried to argue that the plaintiff had been benefited by behaving well, so the reliance at least was not detrimental; but the court would not let him.

I think it is better to look at these cases as deciding whether a contract or something else is going on, not whether reliance or expectation damages should be given for breaking a conceded contract. The contexts are predominantly familial; Fuller says elsewhere, "marital problems qualify on all counts for mediational [i.e., among other things, not contractual] solution."³¹

The Measure of Recovery under Section 90 of the Restatement

The Reliance Interest in Contract Damages mostly promotes the reliance interest. The point of section 90 is to premise recovery on reliance, thus it starts off talking motive. But the (original) *Restatement* measured recovery by the expectation interest. We expect Fuller to advocate that reliance be the measure of recovery too. However, he was curiously reticent here. He said that where "there is a discrepancy between" the expectation and the reliance interests "a court would wisely choose in many situations to protect the expectation interest."³² Then he added that we should recognize "that the remedy must be adapted to the needs of the particular situation."³³ Fuller said some of what we want him to say in his Part I but this is pretty mild stuff. Probably it seems so retrospectively partly because of the impact of *The Reliance Interest*.

Liability for Misrepresentation

The thesis of Part I stated in terms of Fuller's categories 1 through 7 is this. Going from 1 to 7 is like watching a tadpole turn into a frog. If we have

29. [1919] 2 K.B. 571 (C.A.).

30. Fuller & Perdue, *supra* note 1, at 389.

31. Fuller, *Mediation—its Forms and Functions*, 44 S. CAL. L. REV. 305, 330 (1971).

32. Fuller & Perdue, *supra* note 1, at 405.

33. *Id.*

a tadpole at 1 and a frog at 7 we wonder about 5. Correspondingly we label what is happening legally 'contract' at 1 and 'tort' at 7. Fuller finished saying 'contract' only with 6. Tort talk should start at 3.

A contract is at least a live promise. Categories 7, 3, and 4 are about nonpromises, former promises, and unenforceable promises respectively. Category 5 is about live promises that are sometimes contractual (to this extent we must equivocate). Category 6 differs from 7 only grammatically—i.e., insufficiently to motivate classifying them separately at law.

It is a mistake to think we may label a legal entity 'contract' or 'tort' indifferently, as we may label a baby, e.g., 'Elizabeth' without a lot depending on the label. Instead, 'contract' ties us into one pattern of inferences and 'tort' into another. We next say 'consideration' instead of 'due care', etc. Fuller's difficulty in category 4 makes this clear.

Fuller spoke of his categories as containing cases in which *only* the reliance interest is *or* should be protected. The categories evidently contain other cases too. Also 'or' here is distant from 'and'. Courts do not invariably protect the reliance interest when Fuller thinks they should. (That they do not is fine—Fuller was often explaining why law is the way it is; but he also wanted parts of it changed.) And occasionally—e.g., perhaps with the rule from *Flureau*—they protect it when he is not sure they should.

B.

We will try to get some mileage out of *Security Stove & Manufacturing Co. v. American Railway Express Co.*,³⁴ hardly the latest thing. The defendant broke its promise to deliver the plaintiff's gas furnace to Atlantic City to be exhibited at the American Gas Association Convention. The plaintiff intended to display, not sell, the particular furnace token it shipped. Profit would have come by increased sales and was uncertain. If exhibited, the furnace might have malfunctioned so the plaintiff would have sold fewer furnaces than it actually did. Or the plaintiff might have sold every furnace it could manufacture anyway.

With respect to the broken promise, the plaintiff sought reliance damages or what would have been called 'reliance damages' prior to Goetz and Scott. The defendant argued the plaintiff should get expectation damages or nothing (besides shipping charges refunded). The defendant complained the plaintiff was "endeavoring to achieve a return of the status quo in a suit

34. 227 Mo. App. 175, 51 S.W.2d 572 (1932). The name of the plaintiff in the state reporter is 'Security Store' etc.

based on a breach of contract," thereby committing a conceptual error that the defendant invited the court not to endorse.³⁵ The defendant said the plaintiff was "trying to recover what he would have had, had there never been any contract of shipment," rather than correctly "seeking to recover what he would have had, had the contract not been broken."³⁶ Apparently, the defendant put squarely before the court the choice between protecting the expectation interest and protecting the reliance interest.

The court awarded reliance damages. The plaintiff had rented a booth at the convention. It had transported a workman and its president to Atlantic City and back and had maintained them there throughout the convention, waiting respectively to assemble the furnace and to point to it. That the workman and the president had a good time in Atlantic City did not benefit the plaintiff. Giving out-of-pocket expenses as reliance damages, as the court did, is ordinary. But it will look bad by Part II. I will call cases like *Security Stove* where profit is uncertain 'type I reliance cases'.

The usual way we read *Security Stove* is illustrated by Murray's classifying the case under "The Protection of the Reliance Interest."³⁷ We get:

Hypothesis 1 (conventional wisdom): The court in type I reliance cases protects the reliance interest as such.

There are a couple of problems that disturb us early on about hypothesis 1.

The first problem is that the language of the court (by Bland, J.) seems slightly incongruent with hypothesis 1. The court was *unhappy* giving reliance damages, but could not give expectation damages or could not do this directly. It admitted the defendant got "the general rule" of damages right, but said this rule is not "inconsistent with the holdings that, in some instances, the injured party may recover expenses."³⁸ We should expect more of this consistency than that the general rule is not general enough to apply here. Taken more vigorously, 'consistent' suggests the rules are related. The court professed to award the damages it did lest the plaintiff "be deprived of any substantial compensation for its loss."³⁹ A court doctrinally at ease does not talk this way.

The second problem with hypothesis 1 is that *Security Stove's* damages are only implausibly reliance damages. In the introduction we defined reliance damages as putting the nonbreaching party where she would have been had the parties not contracted. Consider then the counterfactual: 'had the parties not contracted'. Imagine that *Security Stove* had not contracted

35. *Id.* at 182, 51 S.W.2d at 576.

36. *Id.*

37. J. MURRAY, CASES AND MATERIALS ON CONTRACTS 19 (3d ed. 1983).

38. 227 Mo. App. at 182, 51 S.W.2d at 576.

39. *Id.* at 184, 51 S.W.2d at 577.

with American Railway Express Company (A). It would have not just stayed home but it would have contracted with another carrier (B). If B would have delivered the furnace on time, and A was required to, the consequents of the counterfactuals for reliance damages and expectation damages are identical except for the name of the carrier, ‘ . . . the furnace parts would have arrived on time, delivered by —’, the blank to be filled by ‘A’ or ‘B’. In *Security Stove*, reliance and expectation damages are identical and include lost profits because the plaintiff would have obtained these had the furnace been delivered on time regardless of who delivered it. Consequently, the court by giving expenses protected neither interest exactly.

There is a terminological awkwardness because we naturally apply the phrase ‘reliance damages’ to recoveries calculated counterfactually and to recoveries calculated by expenditure and these may diverge. How we use ‘reliance damages’ in *each* instance (and the distinction matters) will be indicated whenever its usage is not clear from the context.

It is worth entertaining a different reading of *Security Stove*:

Hypothesis 2: Courts in type I reliance cases award the expectation interest as best they can.

We would support hypothesis 2 by citing what troubles us about *Security Stove* (its weak endorsement of reliance damages and then its not giving them) and arguing: The court’s “fundamental premise”⁴⁰ is that contract law should protect the expectation interest. The court could have calculated damages many ways. It could have given *Security Stove* the sum of the ages of its president’s children plus \$1000, etc. But it wanted not to be arbitrary. The court was not arbitrary if (whatever it recognized as) the reliance interest is related to the expectation interest so that by awarding the first, it awarded approximately the second.

Security Stove is perfectly compatible with both hypotheses. We ordinarily test competing hypotheses by finding contexts where their consequences diverge. Here, the consequences diverge in two kinds of cases. Paradigmatically, *L. Albert & Son v. Armstrong Rubber Co.*⁴¹ is the first kind. Armstrong contracted with Albert to buy four refiners—machines to recondition old rubber—and constructed foundations for them. Albert delivered two of the machines late. Armstrong justifiably rejected all four and sought the cost of the foundations. The difficulty in *Albert* was not that profits were uncertain as they were in *Security Stove*. Armstrong we imagine could calculate its profits too well. World War II was winding down; nobody wanted reconditioned old rubber; the profits would have been negative.

40. See *supra* text accompanying note 14.

41. 178 F.2d 182 (2d Cir. 1949).

Learned Hand, deciding *Albert*, observed the case law was inconsistent. But Fuller's *The Reliance Interest* endorsed what Hand called a "very simple formula": "We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put [the relying promisee] in a better position than he would have occupied had the contract been fully performed."⁴² Hand liked this. "On principle," Hand concluded, "the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."⁴³ I will call cases like *Albert*, characterized by the plaintiff's declining to prove profits because there are losses, 'type II reliance cases'.

Fuller recognized type I reliance cases by his category 1—contracts having uncertain expectancies. He lacked a category corresponding to type II reliance—evidently because courts do not, and he believed they should not, give reliance damages in type II cases. After all, it was Fuller's formula that Hand liked. Types I and II have in common that the promisee in a paradigmatic bargaining context has requested reliance damages. They are unique or nearly unique in this. Courts are in the business of protecting the expectation interest in promises belonging to bargains if they can identify it (type I problem). If both interests are identified, a promisee would ask a court to protect the reliance interest instead of the expectation interest only if the reliance interest is larger (type II problem).

I added the optional 'nearly' before 'unique' in the preceding paragraph to account for a response to the rule in *Hadley v. Baxendale*.⁴⁴ A court does not protect unnatural and unanticipated parts of the expectation interest. A promisee might instead seek reliance damages. In *Hadley* itself we would calculate damages indifferently using expectation or reliance—we imagine if Hadley had not contracted with Pickford, he would have shipped the shaft by another carrier expected to be equally fast. Section 90 says the promisor must reasonably expect the promise to be relied on. Here, 'reasonably' reads the rule in *Hadley* to be that a promisee cannot do better than recover her expectation interest, recalculated to exclude unnatural and unanticipated losses.

The law might have been that the reliance and the expectation interests are unconnected. Then a promisee could sue on either independently. The holdings (although not always the dicta) of type I reliance cases are

42. Fuller & Perdue, *supra* note 1, at 79 (emphasis omitted).

43. 178 F.2d at 189. Hudec says Judge Hand in *Albert* denied other claims for more substantial reliance damages, because Judge Hand judged that plaintiff would have lost had defendant performed. Hudec, *supra* note 6, at 728–30.

44. *Hadley v. Baxendale*, 9 Ex. 341, 343, 156 Eng. Rep. 145, 146 (1854).

consistent with the law being this way. Nevertheless, type II cases indicate that the law is not (in bargaining contexts). By these cases, a court gives a promisee only her expectation interest when both interests have been proven. Hand's rule clarifies Fuller's rule by having its result depend on the burden of proof (this dependence is probably implicit in Fuller's 'knowingly'). The promisee makes out a *prima facie* case for recovering her reliance interest (sometimes understood as her expenditures) by proving this loss. The promisor may then reduce this recovery by the amount that he can prove her expectation interest falls short of her reliance interest so understood. Briefly, if anybody proves the expectation interest, the promisee gets it exclusively.

We attend again to the counterfactual aspects of the definitions of the interests. In type I reliance cases, the court protects the expectation interest indirectly. A promisee mostly proves her expectation interest directly: 'If *Y* had delivered the widgets under the contract, I *would* have had them for —dollars less'. But pretend her expectancy is uncertain so she cannot do this. She may still prove it indirectly by showing how much she has relied: 'If I *had* not contracted with *Y*, I *would* not have built this widget-using machine'. We contract expecting to be at least as well off as if we had not contracted, the argument goes. (Fuller appreciated this: "Plainly it is this divergence between the cost of giving and the gain realized by receiving that makes possible the reciprocal advantages that can result from a properly negotiated exchange."⁴⁵) Our reliance loss consequently gives the *minimum* gain we expect. We might be disappointed of course. But it is up to the promisor—this being only a matter of the burden of proof—to show we would have been.

The second kind of case by which we can compare hypotheses 1 and 2 includes *Chicago Coliseum Club v. Dempsey*⁴⁶ and *Anglia Television Ltd. v. Reed*.⁴⁷ These cases go oppositely, so we support either hypothesis by picking sides. I have never liked *Dempsey*. Dempsey broke his promise to fight and the Club sought its expenses. The court decided it could not recover those incurred before it contracted with Dempsey because it could not, *at that time*, reasonably have been relying on the contract. So it was pretty obviously protecting the reliance interest. *Dempsey* is like a type I reliance case because profits are uncertain. But in *Dempsey*, or *Dempsey* unadulterated, there is no reliance, the plaintiffs having spent what they spent before contracting.

In *Anglia*, Anglia contracted with Reed for the latter to act in its filmed play. Reed repudiated (apparently) a day later. Anglia did not contract with

45. Fuller, *supra* note 31, at 317.

46. 265 Ill. App. 542 (1932).

47. [1971] 3 All E.R. 690 (C.A.).

another actor and did not produce the play. It could not prove its profits and consequently claimed for what the court called 'wasted expenditure'. Lord Denning gave expenditures wasted *both* after *and* before contracting, all expenditures "as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken."⁴⁸

Murray, not a hero here, classifies *Anglia* with *Security Stove* under "The Protection of the Reliance Interest."⁴⁹ This appears wrong. Given Denning's reasoning, the result would have been insensitive to Reed's having repudiated anytime, regardless of how short, after agreement. But then we get an unadulterated case of no reliance. Denning's term 'contemplation of the parties'⁵⁰ is expectation measure talk. The brief *Hadley* opinion uses forms of 'contemplate' five times. Denning put *Anglia* where it would have been had Reed performed the contract, not where it would have been had *Anglia* and Reed not contracted. That is, Denning did this to the extent *Anglia*'s proof permitted it: as did Bland in *Security Stove*, Denning had to estimate *Anglia*'s expectation from its expenditures. *Anglia* is unequivocally a case in which the court chose the expectation measure over the reliance measure where this choice mattered not just doctrinally but to the result.

That with promises bargained for the reliance recovery is just a surrogate for the expectation recovery was a not quite clearly articulated premise of the remedial part of the first *Restatement*. The remedies it endorsed were listed in section 326 and included only "compensation for injury," specific performance, and restitution.⁵¹ According to section 329, a promisee was compensated when he received "the net amount of the losses caused and gains prevented by the defendant's breach."⁵² Evidently 'compensation' was defined in terms of the expectation interest. Fuller told us section 333, "When Damages May Be Measured by Expenditures in Part Performance," is opaque to "one uninitiated in the systematics of the *Restatement*."⁵³ The section seems not that bad. A judgment for expenditures, it taught us, "is a judgment for a portion of the value promised by the defendant, the receipt of which by the plaintiff is prevented by the breach."⁵⁴ (Fuller disparaged this as "tendentious."⁵⁵) And with 'he' referring to the promisee, it instructed us, "[s]ince in the usual case he is entitled to expenditure plus profits, his

48. *Id.* at 692.

49. J. MURRAY, *supra* note 37, at 543.

50. *Anglia*, 3 All E.R. at 692 (quoting *Lloyd v. Stanbury*, [1971] 2 All E.R. 267, 276 (Ch. 1970)).

51. RESTATEMENT OF CONTRACTS § 326 (1932).

52. *Id.* § 329.

53. Fuller & Perdue, *supra* note 1, at 90.

54. RESTATEMENT OF CONTRACTS § 333 comment a (1932).

55. Fuller & Perdue, *supra* note 1, at 90.

inability to prove profits should not deprive him of his right to the proved expenditure”⁵⁶

I think Fuller misinterpreted section 333. At least he read it a way that unnecessarily provoked trouble. He protested that the section discriminated between *kinds* of expenditures, implying that expenditures may not be recovered if they are the wrong kind, i.e., are not “made in performing . . . or preparing to perform” a contract.⁵⁷ We have rather been reading it to relate to the *reason* we protect the reliance interest—that it is or is not included in the expectation interest. Read this way there is not the implication he disliked.

C.

Comment d to section 90 of the second *Restatement* announces that a “promise binding under this section is a contract.”⁵⁸ This is a strange thing for the *Restatement* to say because the *Restatement* has already defined a contract as a binding promise.⁵⁹ We would think saying it once is enough. Comment d continues, “and full-scale enforcement by normal remedies is often appropriate.”⁶⁰ Normal contract remedies most prominently protect the expectation interest. The adjective, ‘full-scale’, suggests this is what would be protected too. The *Restatement* appears to need to rebut some presumption that normal remedies are *not* appropriate. Moreover, ‘often’ looks like a wrong word. Either ‘always’ or ‘as a matter of course’ would seem better. Fuller wanted courts to have latitude about remedies. That the *Restatement* mostly adopted Fuller’s program, however, does not explain what is going on here. What does explain it is an intellectual accident of legal scholarship in the late 1920’s and early 1930’s.

Gilmore, in *The Death of Contract*, described how Williston and Corbin wrote section 90. (There were giants in the earth in those days.) Williston, Chief Reporter, believed promises become contracts by belonging to bargained-for exchanges and said so in section 75. Corbin, his principal assistant, thus Special Advisor and Reporter on Remedies, cited “hundreds, perhaps, or thousands” of instances of courts having protected *some* interest in promises merely relied on, and asked: “Gentlemen, what do you intend to do about these cases?”⁶¹ What they did is section 90. Corbin asked a right question.

56. RESTATEMENT OF CONTRACTS § 333 comment b (1932).

57. Fuller & Perdue, *supra* note 1, at 90.

58. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (1981).

59. *Id.* § 1 comment g.

60. *Id.*

61. G. GILMORE, *supra* note 4, at 63.

The idea was to make contracts of the relied-on promises in the cases. This was the obvious move because Corbin and Williston were restating *contracts*. The difficulty arose because Williston had a rigid conception of what a contract is: a thing whose expectation interest courts protect. He distinguished contracts from other things by what courts do about breaches of them. This dogmatic insistence on the character of a contract led to the notorious exchange between Williston and Coudert. Johnny's uncle promises Johnny \$1000 if he buys a car. Johnny, relying on his uncle's promise, buys a car, paying \$500 for it. Williston told Coudert, at best reluctant to believe it, Johnny could recover the entire \$1000, although he gave his uncle no consideration and relied only to the extent of \$500.⁶² I.e., the reliance interest is \$500; the expectation interest is \$1000; Johnny gets \$1000. Williston explained to the lawyers later: "Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made."⁶³

Williston defined 'contract' by the consequences of calling a thing such. This looks legal-realistic but is not. Methodologically, Williston was the opposite of a legal realist. A realist—e.g., Corbin—began with the entities or activities. He would apply 'contract' to them as a product of having classified them functionally. Anyway, a realist would not care very much what one called the entities or activities. Fuller was close to Corbin in beginning his casebook with remedies and remaining ecumenical (as Goetz and Scott are not). Williston, conversely, began *a priori* with a classification and recognized, or better constructed, only entities consistent with it.

This is Calvinist contract law. A propensity for it was built into Williston. As he observed in his autobiography, "[w]ork and prayer were emphasized" (in Williston's father's childhood); a "curious feature of Calvinistic theology" (that celebrating Christmas is an offense) "remained so far operative . . . my father did not know until he was a grown man on what day Christmas fell"; "[o]n Sunday morning [Williston's] family was taken to church to hear the Calvinistic theology of the Rev. Samuel Seely"; etc.⁶⁴ The theology contributed to Williston's unyielding certainty about what a contract is. By it, things are either white ("either a promise is binding . . .") or black (" . . . or it is not").

Section 90 of the original *Restatement* required that reliance be of "a definite and substantial character" before relief could be obtained.⁶⁵

62. AMERICAN LAW INSTITUTE, *Appendix*, 4 PROCEEDINGS 98-99 (1926).

63. *Id.* at 103.

64. S. WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 6, 6-7, 24-25 (1941).

65. RESTATEMENT OF CONTRACTS § 90 (1932).

Obviously, if relief were not restricted this way, slight reliance by a promisee would initiate protection of his entire expectation interest. The requirement follows from section 90's using the promisee's reliance to motivate recovery, not to measure it. Eisenberg, beginning from Williston's conversation with Coudert, instructs us that the "real reason for both limitations"—the limitations are definiteness and substantiality—"apparently rested in an unstated axiom of Williston concerning remedies."⁶⁶

Axiom (Williston; reported by Eisenberg): "[A]s a matter of contract law any promise that is legally enforceable at all must be enforceable to its full extent (through the award of expectation damages), rather than merely to the extent of the promisee's reliance."⁶⁷

Section 90 of the second *Restatement*, of course, repudiates the axiom; thus, the "remedy granted for breach may be limited as justice requires."⁶⁸ Doing this lets the section omit the 'definite and substantial' language of the original *Restatement*. So by section 90, a judge may decide to award damages because of reliance, then measure the amount of damages by the degree of the reliance.

The situation the second *Restatement* corrected was this. Section 90 by its terms applied only to avoid injustice (it still does). Imagine that 'injustice' abbreviates 'injustice in general' not 'a particular injustice'. Where the reliance was not large, it was unjust not to award the promisee anything and unjust to award her expectation damages. There was injustice to be avoided; however, section 90 did not apply because applying it would not avoid injustice, but only exchange one manifestation of it for another.

Corbin did not accept Williston's axiom. He was happy to define contracts as enforced promises (he gave other definitions too), but to enforce some promises only to the extent of the promisee's reliance.⁶⁹ More specifically, if "the action in reliance may have cost very little, and that little can be measured," Corbin allowed, or more probably suggested, "damages awarded might well be adjusted to that cost."⁷⁰

"In particular," comment d to section 90 says, "relief may sometimes be limited" to "relief measured by the extent of the promisee's reliance rather than by the terms of the promise."⁷¹ This is perhaps disingenuous in that 'sometimes' *badly understates* the significance of the reliance remedy in section 90 cases. Probably more often than not, relief is limited in this way. *Hoffman v. Red Owl Stores, Inc.*⁷² is a good reliance case. Fried cites it as

66. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 658 (1982).

67. *Id.*

68. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1) (1981).

69. 1A A. CORBIN, CONTRACTS § 200 (1963).

70. *Id.* § 205.

71. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (1981).

72. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

the “culmination” of “the American development of the doctrine of promissory estoppel.”⁷³ But of course this development keeps on culminating. In *Hoffman*, the defendant promised the plaintiffs to build and let them operate a grocery store. The plaintiffs relied on the defendant’s promise by selling their bakery, etc. The court appealed to section 90 to establish liability, then awarded reliance damages. Henderson, in *Promissory Estoppel and Traditional Contract Doctrine*, refers to other cases ruling identically.⁷⁴

The result in *Hoffman* is ordinary, but its language is atypically direct. The court, in working up to not protecting the expectation interest, denies it is doing contract law. It says: “We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action.”⁷⁵ Still more explicitly it says: “Plaintiffs contend that in a breach-of-contract action damages may include loss of profits. However, this is a not a breach-of-contract action.”⁷⁶

Henderson, surveying *Hoffman* and cases like it, says there is, and laments, “a general failure to recognize that Section 90 is catalogued under the heading of informal contracts without consideration.”⁷⁷ He believes that if courts would count promises relied on as real contracts they would be more inclined to protect the expectation interest instead of just the reliance interest and this would be a good thing. We should ask what has happened since Henderson’s paper, which is fifteen years old.

Except for damages, *Walters v. Marathon Oil Co.*⁷⁸ is like *Hoffman v. Red Owl Stores, Inc.* Relying on Marathon’s promise (which Marathon broke) to sell gas to them, Walters and his wife bought property for a gas station/food store. The district court found Marathon liable by promissory estoppel and awarded Walters and his wife lost profits. Marathon argued on appeal that, its liability being based on promissory estoppel, “loss of profits is not a proper measure of damages”; instead, damages ought to be the “expenditures in reliance on the promise,” calculated by subtracting the then present value of the property Walters bought from what he paid for it.⁷⁹ Conveniently for Marathon, the calculation yielded a negative number.

Applying Indiana law, the circuit court affirmed, awarding lost profits. Feinman cites the case first to support a claim that “the typical damage

73. Fried, Book Review, 93 HARV. L. REV. 1858, 1867 (1980).

74. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

75. 26 Wis. 2d at 689, 133 N.W.2d at 275 (1965).

76. *Id.* at 701, 133 N.W.2d at 276 (1965).

77. Henderson, *supra* note 74, at 378.

78. 642 F.2d 1098 (7th Cir. 1981).

79. *Id.* at 1100.

remedy applied in promissory estoppel cases is measured by the expectation interest.”⁸⁰ But the *Marathon* court does not appear to be applying this remedy. It said, “[i]t is unreasonable to assume” Walters and his wife “did not anticipate a return of profits from this investment of time and funds, but, in reliance upon [the] promise, they had forgone the opportunity to make the investment elsewhere”; consequently they “suffered a loss of profits as a direct result of their reliance upon the promise.”⁸¹ Obviously, this talk is not about the expectation interest.

The *Marathon* court asked, ‘Where would Walters and wife have been if they had not contracted with Marathon?’, and answered, ‘Getting equal profits elsewhere’. The court protected the reliance interest, but gave just what it would have given had it been protecting the expectation interest. Its doing this should not surprise us because Fuller warned that reliance damages *often* equal expectation damages, if we regard opportunity cost (as we should).⁸² Feinman remarks that “expectation recovery may better reflect opportunity losses than would reliance recovery.”⁸³ Feinman (I think wrongly) calls ‘protecting the expectation interest’ what I call ‘protecting the reliance interest’ if the damages awarded are the same. The line between not recovering and recovering profits, or between expenditures and other reliance, may itself be significant. But classically, ‘reliance interest’ and ‘expectation interest’ do not draw it.

Walters’s reliance recovery ought to include the profits Walters would have made investing elsewhere, not (as such) the profits he would have made if Marathon had kept its promise. But Walters proved only the latter. Because the market for capital is approximately competitive, the profits either way should be the same modulo risk. Or Walters, by proving his profits if Marathon had kept its promise, established a *prima facie* case of the extent of his reliance, shifting to Marathon the burden of proving he could not have gotten these profits elsewhere. This latter result is symmetrical with that reached by Hand in *Albert*.⁸⁴

Goetz and Scott suggest protecting the reliance interest (as they interpret it) as the general remedy for breach of contract. Farber, responding, imagines that if contracting parties regularly broke promises there frequently would not be damages for breaking a particular promise, because there would not be any opportunity costs—alternative investments would be equally unproductive. Applied in *Marathon*, Farber’s idea is that if the

80. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 687–88 (1984).

81. 642 F.2d at 1100.

82. See *infra* notes 112–113 and accompanying text.

83. Feinman, *supra* note 80, at 688.

84. See *supra* notes 41–43 and accompanying text.

world were really a nasty place, there would be a difference between what Walters was promised and what he lost by relying.⁸⁵

In a long footnote,⁸⁶ Feinman cites other cases to support the contention that courts routinely protect the expectation interest in *Restatement* section 90 or promissory estoppel cases. However, these cases likewise tend not to persuade us because they also turn on opportunity costs or involve special equities (insurance cases or retirement benefits cases). *Marathon* differs from *Hoffman* by awarding profits. We best explain this difference not doctrinally, but by rates of inflation. Just returning expenditures left the relying party less well off in 1981 than it would have been in 1965.

The word 'contract' does not appear in *Marathon*. If judges in cases like *Hoffman* and *Marathon* decline to do what the *Restatement* instructs them to do—talk contract law—it is because they do not want to, not because they do not grasp the *Restatement's* taxonomy and the doctrinal consequences of this taxonomy. They see a different Platonic form than does the *Restatement*.

I will label 'Willistonian' anyone who accepts Williston's axiom. If we define a thing by what it is not, Goetz and Scott are the arch-anti-Willistonians. Fuller is anti-Willistonian, too, but perhaps not implacably so. We are able to distinguish several kinds of Willistonians. The orthodox (middle-of-the-road) Willistonian will draw the line between a contract and something else between *Restatement* sections 75 (bargained-for promises) and 90 (relied-on promises). There are possible deviations to the left and to the right. Rightness and leftness are a matter of degree; however, a right Willistonian asserts that promises relied on are contracts *too* while a left Willistonian denies that *even* promises bargained for are contracts. Evidently the Corbin/Williston compromise of the original *Restatement* is right Willistonian.

I will argue briefly and schematically for middle-of-the-road Willistonianism. Contracts are those transactions having an expectation interest which we will protect; only bargained-for promises can be contracts.⁸⁷ Breach of a promise merely relied on is a tort, if anything.⁸⁸ Middle-of-the-road Willistonianism is thesis B: *Only* the expectation interest counts.⁸⁹ If we equivocate over 'contract', theses A and B may be thought to differ merely doctrinally not substantively. There is no observational difference between doctrinally different, but substantively identical, theses. Theses differing only doctrinally are notational variants of each other; doctrinal

85. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U.L. REV. 303, 306–10 (1983).

86. Feinman, *supra* note 80, at 688 n.53.

87. *See infra*, Part ID.

88. *See infra*, Part IC.

89. *See supra* text accompanying note 7.

differences in this sense are epiphenomenal. Then we may translate B into A: The expectation interest counts *too*. The languages expressing them will differ slightly, but case outcomes will be the same. To get from B to A, we just expand the scope of 'contract' so that it includes relied-on promises, but we retain the results in the cases. By both A and B, promises bargained for are contracts. By B but not A, promises merely relied on are potential torts. By A but not B, promises merely relied on are contracts having only reliance interests in them protected.

Whittier was a contracts scholar whose floruit was about when the first *Restatement* was being put together. He is *the* left Willistonian. As late as 1929–30, he argued that a contract ought to arise only if there has been an "actual meeting of the minds mutually communicated."⁹⁰ So he required what the objectivist requires plus a mental element. Consider the situation in which traditional doctrine and the case law find a contract, while Whittier would not. *Y* addresses *X*, 'I offer to sell you my cow for \$10'; *X* replies, 'I accept'. Assume, for whatever reasons, the minds of *X* and *Y* do not meet. Whittier need not accommodate the cases and is trying to *reform* doctrine, but intuitively in *some* situations of this type the law must do *something*. He handled the difficulty by characterizing a culpable causing of the minds of parties not to meet (so they could not contract) as "carelessly misleading the other party into the reasonable belief that there was assent."⁹¹ Then he contended that the liability for so misleading "might well have been held to be in tort."⁹² Obviously, 'carelessly' is a tort word. Whittier asked, "[i]f *D* drives down Michigan Avenue, Chicago, in a careless manner but no one is hurt, can any of those who might have been hurt sue *D*?"⁹³ He thought that if *Y* carelessly or even intentionally misleads *X* but *X* is not hurt, *X* ought not to be able to recover anything from *Y*. Much turns on how we define 'hurt'. Using tort concepts, Whittier defined it as making the aggrieved party worse off than he would have been if the parties had not interacted. Evidently, the reliance interest, not the expectation interest, is thus protected.

For promises only relied on there are two bits of evidence from Part IA suggesting that tort doctrine should apply. The categories there are ordered (by Fuller) so that juxtaposition tells us something. The *Restatement* section 90 cases come just before the misrepresentation cases. At least, then, if we get beyond the former we are applying tort law. Also, if for promises relied on we protect the reliance interest, but not the expectation interest, we use the reliance interest to motivate and to measure recovery. Then we avoid the

90. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 442 (1929).

91. *Id.*

92. *Id.*

93. *Id.*

discontinuity the original *Restatement* encountered regarding 'definite and substantial reliance'. The promisee would continue to rely, but receive no relief until he had relied definitely and substantially. Then he would get his expectation interest. At some point, perhaps \$200, as Johnny pays more for a car in Coudert's and Williston's hypothetical case,⁹⁴ his uncle's liability instantly increases from \$0 to \$1000.

Moreover, section 90 just looks like tort law. Its tort-like aspect was recognized early. In 1932, compensating somebody for having detrimentally relied was called "the tort principle" in section 90 talk.⁹⁵ Intuitively, the contention is that facts of cases applying section 90 are not outlandishly distinct from those in ordinary misrepresentation cases. (The similarity cuts both ways; Fuller lamented that it is the expectation interest that frequently receives protection in misrepresentation cases.) "Yesterday I said, 'I promise to give you a horse.' But I did not give you anything, and today you accuse me of the heinous immorality of breaking a promise."⁹⁶ "No, I reply," hypothetically admitting I (merely) misrepresented, but denying the basis of a *Restatement* section 90 cause of action, "I am not guilty of that at all, but only of the much lesser offense of lying. All that happened was that yesterday I stated falsely that I was promising to give you a horse."⁹⁷ "It is easy to see what is wrong with this story," van Fraassen comments on it. "In saying, 'I promise . . .', I must (normally?) be taken to be doing something more than implying or stating an autobiographical fact" ⁹⁸ The something more I am doing is, he says, "expressing."⁹⁹

We want to find language that brings together misrepresentation and section 90. The expression 'estoppel'—with subspecies 'estoppel in pais' and 'promissory estoppel'—purports to do this, but arguably is empty. Gilmore, taking the easy shot that sometimes appealed to him, dismissed 'estoppel' as "simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for plaintiff."¹⁰⁰ However, persons promised to or represented to equally want a sentence to be true and they rely on its being true. Fuller helps us here by giving 'interests in affirmation' to designate this shared element.

94. See *supra* notes 62–63 and accompanying text.

95. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 22 (1933).

96. van Fraassen, *Calibration: A Frequency Justification for Personal Probability*, in PHYSICS, PHILOSOPHY AND PSYCHOANALYSIS: ESSAYS IN HONOR OF ADOLF GRUNBAUM 295, 296 (1983).

97. *Id.*

98. *Id.*

99. *Id.*

100. G. GILMORE, *supra* note 4, at 64. "It was Oliphant who, on my very first day in Law School, embarrassed me before the class of 365 students," Douglas related. "He asked my name, had me stand, and then asked, 'Mr. Douglas, what is an estoppel?' My mind was a blank. All I could say was, 'I know it's not anything you find in the woods. Whether it is a legal principle or a disease, I haven't the least idea.'" W. DOUGLAS, *GO EAST, YOUNG MAN* 146 (1974).

In the course of not letting the United States punish contracting parties for misrepresenting that they intended to perform their contract, the court in *Chaplin v. United States* denied that an intention, “as manifest by false and misleading promises, standing alone, is a *fact* in the sense required for a conviction on the charge of false pretenses.”¹⁰¹ As contract law read anachronistically,¹⁰² *Chaplin* instructs us that the expectation measure of damages is, by itself, optimal or enough; that we would not breach efficiently, if we were to anticipate having to pay off nonbreaching parties *and* go to jail (or merely litigate whether we must go to jail).

This optimality is none of our present business, which is tort law. In tort law, sometimes “the law has accepted a person’s state of mind [including his intentions] as a fact.”¹⁰³ Then ‘I intend A’ may misrepresent. And if a “promise itself is generally regarded as a representation of a present intention to perform,” promising may misrepresent the fact of “the speaker’s present state of mind [if] made by one not intending to perform.”¹⁰⁴

Nobody is doing serious metaphysics about this. What matters is not that promises and representations are as entities similar. Rather it is we ought not to distinguish among the consequences at law of pieces of language unless we have a functional reason to do so. And for relied-on promises that matter to *Restatement* section 90 and ordinary misrepresentations of fact in tort law not criminal law we just do not have this reason.

D.

The Reliance Interest appeared in 1936, four years after the first *Restatement* was published. The chronology matters because it denied Fuller time to reflect on Williston’s claim that cases falling under section 90 are contract cases. The technical equipment Fuller brought to the cases also is significant. In its philosophical aspect, it was predominantly Aristotle’s ethics. The ethics helped Fuller to isolate his three interests, but after that it did nobody any good.

The Reliance Interest has this structure. Part 1 argues early on that the reliance interest is more *worthy* of protection than is the expectation interest. The rest of part 1 and part 2 celebrate the reliance interest by showing that courts protect it more often than we suspected. The argument relates to the celebration by inspiring us to read charitably what Fuller says about the case law. The evidence, however, does not require that we take the

101. 157 F.2d 697, 698 (D.C. Cir. 1946).

102. See *supra*, Pt. I, § 4.

103. James & Gray, *Misrepresentation—Part II*, 37 MD. L. REV. 488, 504 (1977–78).

104. *Id.* at 506.

case law as being as solicitous of the reliance interest as he indicates. Fuller has disposed us to read the case law charitably because he has given us, *a priori*, a reason to like the reliance interest better than the expectation interest. Because much depends on this reason, we should inspect carefully how good it is.

Pertinent passages of Aristotle opposed corrective justice, putting things back where they had been and should be, to distributive justice, getting things right to start with.¹⁰⁵ Fuller stated: "It is obvious that the three 'interests' we have distinguished [the restitution, reliance, and expectation interests] do not present equal claims to judicial intervention."¹⁰⁶ He recognized that the restitution interest presents the best claim. Protecting the restitution or the reliance interest does corrective justice. Aristotle conflated these interests. Having posited a *theoretical* reason—corrective justice is "intermediate"—to find gains and losses offsetting, Aristotle *made up* gains if these were not otherwise evident—just as Fuller, playing realist, said we covertly protect the reliance interest by constructing a fictional something to give back.¹⁰⁷ However, Fuller, fully exploiting his mathematical resources, asserted, not unreasonably given what he had to work with, that the restitution interest "presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two."¹⁰⁸

When Fuller arrived at last at the expectation interest, he was speaking less urgently, not about corrective justice (which courts obtain by protecting the restitution or reliance interests), but about distributive justice. And mostly he was puzzled. He had read the cases and realized the law *regularly* protects the expectation interest. But he could not see why. He said, sounding like Aristotle and sparing us explicit quantification, "the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him."¹⁰⁹ The words 'actually' and 'merely' signal the weights Fuller assigned the reliance and the expectation interests respectively; 'certainly' indicates for Fuller the question was not open, had already been decided.

Fuller said, "It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by

105. ARISTOTLE, *Nicomachean Ethics* 1130^b30–1131^a9, in *THE BASIC WORKS* 927, 1005–06 (R. McKeon ed. 1941).

106. Fuller & Perdue, *supra* note 1, at 56.

107. ARISTOTLE, *supra* note 105, 1132^a6–24, at 1008–09.

108. Fuller & Perdue, *supra* note 1, at 56.

109. *Id.*

the value of the promised performance.”¹¹⁰ As Fuller says judgmentally, this concern to protect the expectation interest “throws its shadow across our whole subject” (shadows are unwanted entities). His efforts bear out that it is no easy thing to explain this concern.

Fuller tried several explanations: the “psychological” (the promisee feels hurt even if she has not relied); the “will theory” (contracting parties legislate the result); the “economic or institutional approach” (our expecting promises to be kept generates a kind of property in them).¹¹¹ He rejected these explanations, respectively, because we do not protect every promise; because parties contracting do not legislate to protect the expectation interest but get the remedy imposed on them; and because the property we have in promises is a consequence of the remedies we give for breaking them, not a cause of the remedies. Fuller is doing fine so far; we all dislike the reasons he is rejecting.

Fuller’s explanation has two aspects. The less interesting aspect invokes “the need for facilitating reliance on business agreements.”¹¹² This aspect supports protecting reliance instead of something else. I.e., it is a reason to protect the expectation interest only if the interests coincide. The other aspect is that protecting the expectation interest provides “a prophylaxis against the losses resulting from detrimental reliance.” This aspect was worked up from a “suspicion that there lies hidden behind the protection of the expectancy a concern to compensate the plaintiff for the loss of the opportunity to enter other contracts.”¹¹³ As Fuller saw contract remedies, we protect the expectation interest to protect indirectly the more fundamental reliance interest. As I see the two interests, this is a small tail on a big dog, regardless of how hard it is wagging.

Often, the expectation interest and the reliance interest come to the same thing. *X* contracts with *Y*. He could have contracted with *Z* on identical terms but wanted only one contract. But where opportunity cost is not high, we ordinarily rely less than we expect. In this situation, Fuller’s explanation does badly. “Whatever tends to discourage breach of contract,” Fuller told us truly, “tends to prevent the losses occasioned through reliance.”¹¹⁴ This does not get us very far. Dying of one disease keeps us from contracting another. But we do not get excited about connecting the diseases this way. Fuller should say why awarding *exactly* the expectancy is good. But he has done the best he can. What else he says is as analysis embarrassing. “It is therefore possible to view the rule measuring damages by the expectancy in

110. *Id.* at 57.

111. *Id.* at 57–60.

112. *Id.* at 62.

113. *Id.* at 61.

114. *Id.*

a quasi-criminal aspect, its purpose being not so much to compensate the promisee as to penalize breach of promise by the promisor.”¹¹⁵

To find out what Fuller missed, we listen to Perini, the contracts teacher in *One L*. He gets things wrong too, but they are different things.

We were studying *Hadley v. Baxendale*, a famous case which established a limit on the kinds of damages a winning plaintiff in a contract suit could collect. Perini asked us what the rule of Hadley was *not* designed to do. He said there was a one-word answer. People raised their hands offering responses ranging from “work” to “make sense,” and Perini toured the room, quickly shooting them down: “No,” “Never,” “Silly,” “You think *that* makes sense?”

When he saw my hand, he whirled and pointed.

“To punish,” I said. I was shocked I was speaking. My heart was slamming in my chest

“How so?”

“The way the rule works, it doesn’t act to punish somebody who breaches a contract.”

“What difference does that make?”

“It means that damages aren’t awarded to deter breach.”

“What are they intended to do, then?” Perini asked.

“Just compensate the loss.”

“Right!” said Perini. “Contract damages are merely intended to compensate plaintiff for his loss. You leave all that soul-splitting over punishment behind in Torts and Criminal Law—it’s not for Contracts!”¹¹⁶

Perini is partly right. Contract law is not intended to punish. But Fuller demonstrated it is not, in its aspect of protecting the expectation interest, intended to compensate either. It overcompensates. Or, if it does not, the loss it is compensating is not very important. The student and Perini confuse deterrence and punishment. Criminal law deters by punishing. Tort law deters by compensating (punitive damages aside). Both deterring and compensating are significant for tort law. Both are significant for contract law too. But contract law, understood to protect the expectation interest, compensates only incidentally as it goes about deterring. Its function is to put productive resources in the right place, not to distribute their products justly (or any other way).

115. *Id.*

116. S. TUROW, *ONE L* 73 (1977).

It gets resources to where they are going to be used most efficiently and keeps them there. *Y* is going to break his promise to *X* if and only if he can do this profitably. To protect *X*'s expectation interest in a broken promise, a court puts her in as good a position as she would have been in had *Y* kept that promise. Then *Y* will break the promise if and only if *Y* can gain despite having to pay *X*. But if *Y* can do this, the community is better off if he does it. The community is better off only because *Y* is better off. That is, *X* is no worse off; *Y* is better off; everybody else is the same (by hypothesis).

We see easily that, if we assess damages beyond the expectation measure, *Y* is going to *keep* too many promises. Imagine this promise: *X*'s expectation interest, \$10; *Y*'s profit from breaking it, \$11; damages, \$12. *Y* keeps this promise because this puts him \$1 ahead. Nevertheless the community loses \$1 by his doing so.

Identically, if damages are assessed at less than the expectation measure, *Y* is going to *break* too many promises. Imagine this promise: *X*'s expectation interest, \$12; *Y*'s profit from breaking it, \$11; damages, \$10. *Y* breaks this promise because this puts him \$1 ahead. Nevertheless, the community loses \$1 by his doing so.

Protecting the expectation interest deters just the right amount, optimally deters. Fuller was misled here in the way he was usually misled, especially in his debate with Hart.¹¹⁷ He believed contract law has something to do with morality; however, mostly it does not, as Holmes taught us long ago it does not.

II. GOETZ AND SCOTT

A.

Courts have been unsophisticated about calculating the reliance interest. For example, *Devecmon v. Shaw*¹¹⁸ gave its promisee out-of-pocket costs. Because these were the entire expenses of his trip to Europe, the court's decision made Devecmon better off than he would have been had the promise not been made. However, being as well but no better off than if the promise had not been made has been the test of protecting reliance. The best thing about *Enforcing Promises* is its detailed determination of how a promisee relies.

Goetz and Scott provide a diagram which I reproduce as figure 1 and will explain.¹¹⁹

117. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

118. 69 Md. 199, 14 A. 464 (1888).

119. Goetz & Scott, *supra* note 2, at 1268, figure 1.

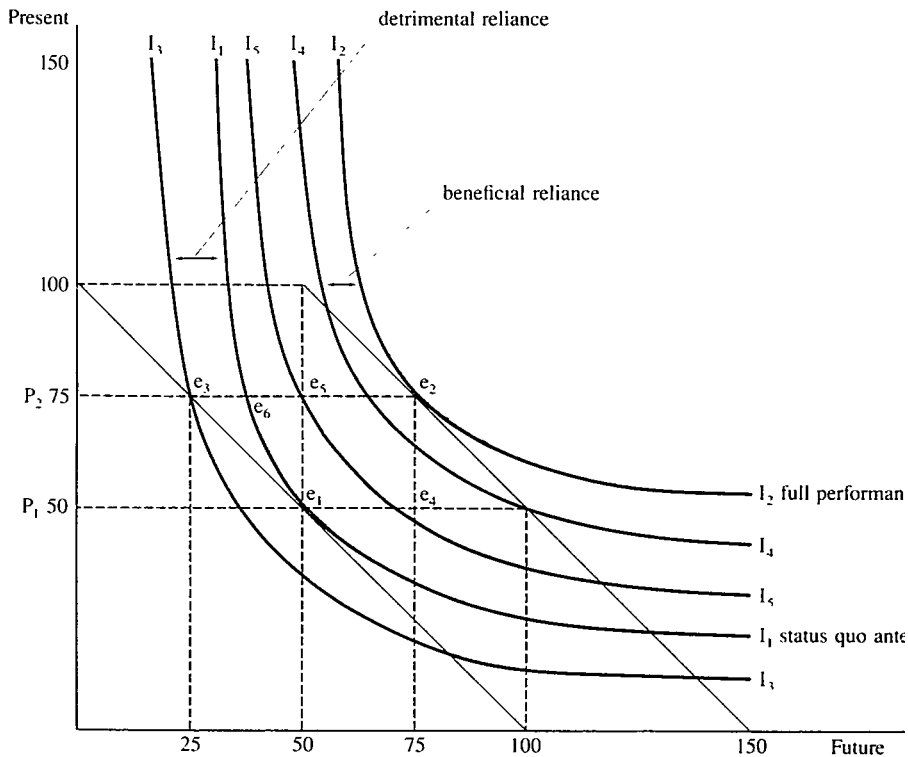


Figure 1.

X will be the promisee as the story develops. Right now she is just spending money. We plot dollars she spends in the present (period 1) and the future (period 2) along vertical and horizontal axes respectively. Because she begins with \$100 to allocate between present and future, X can be at any point along (or inside if she gets confused) the diagonal line (budget constraint) running between the 100's on the axes. I_1 through I_5 are indifference curves, loci of points at which X is equally satisfied. As we have drawn everything, X will spend \$50 at period 1, then \$50 at period 2, thereby locating herself at e_1 . At this point indifference curve I_1 is tangent to the budget constraint. Indifference curves higher and further to the right indicate X 's greater satisfaction. She is not going to be satiated by having \$100. By reaching indifference curve I_1 , she gets the most satisfaction possible for her for \$100.

Pretend Y gives \$50 to X at period 2. We are still not talking promise, only gift. She can spend the \$50 at period 2 but not at period 1. The budget constraint gets displaced to the right. Although X could choose to spend \$100 at period 1 and \$50 at period 2, \$0 at period 1 and \$150 at period 2, etc., the most she can spend at period 1 is \$100. Imagine Y merely gives X

the money, without telling her at period 1 he is going to do this. *X* will spend \$50 at period 1 trying to get to e_1 , as above, and must spend \$100 (all the rest) at period 2, therefore will be at e_4 on indifference curve l_4 . l_4 is to the northeast of l_1 so *X* is more satisfied there. But *X* can do even better; it is here the institution of promising enters.

So let *Y* promise *X* at period 1 to give her \$50 at period 2. *X*, relying on *Y*'s promise, can spend \$75 at period 1 and (assuming *Y* keeps his promise) \$75 at period 2, thereby ending up on indifference curve l_2 at e_2 . *X* is happier on l_2 than she would have been on l_4 . Goetz and Scott call the difference in dollars between the levels of *X*'s satisfaction on l_2 and on l_4 *X*'s *beneficial reliance*. Beneficial reliance is measured in dollars, not units of utility. Where we calculate the point on the vertical axis matters because, at different points, the indifference curves are different distances apart. Here it should be calculated at \$50. l_2 is inadvertently drawn to show too little slope opposite the \$50 point so beneficial reliance misleadingly looks infinitely large.

Pretend *Y* does not give \$50 to *X* at period 2 (breaks his promise). Having already spent \$75 at period 1 in reliance on *Y*'s promise, *X* must spend only \$25 in period 2 (all she has left). She is at e_3 on indifference curve l_3 . If *X* had not relied on *Y*'s promise, she would have ended up at e_1 on higher indifference curve l_1 . The dollar difference between *X*'s satisfaction on l_1 and that on l_3 is what Goetz and Scott call *X*'s *detrimental reliance*. The court in *Devecmon* probably tried to give detrimental reliance in some sense (it evidently was not trying to do something more subtle); its award, however, is only distantly related to detrimental reliance as Goetz and Scott identify it. A comparable award to *X* would leave her on l_2 (giving \$50: all *Y* promised) or on l_5 (giving \$25: all *X* spent relying). But Goetz and Scott have the ideas precisely right, i.e., their detrimental reliance is the real detrimental reliance.

We derive the following matrix of outcomes. We get the outcomes of column 1 or column 2 depending on whether *Y* promises or not. The outcomes—the u_i 's—are the utilities to *X* of the combinations of *Y*'s promising and performing. The subscripts of the 'u's are the subscripts of the corresponding indifference curves or points of figure 1 on/at which *X* might end up.

	<i>Y</i> promises	<i>Y</i> does not promise
<i>Y</i> performs	u_2	u_4
<i>Y</i> does not perform	u_3	u_1

Imagine tomorrow is *X*'s birthday. *X* usually buys a cake for it herself (price: \$5). *Y* may/may not give her a cake/promise to give her a cake. If *Y*

promises to give her a cake X is going to rely on the promise and so not buy a cake herself. X 's beneficial reliance is the difference in dollars between u_2 (1 cake + \$5) and u_4 (2 cakes). Set it at \$3. It's between \$0 and \$5. Also, X 's detrimental reliance is the difference in dollars between u_1 (1 cake) and u_3 (no cake + \$5). Set it at \$6. If Y promises one of the reliances will be realized.

Or imagine R.R. and P.N. have robbed a train and are being pursued by a posse. They come to a cliff. R.R. climbs down but P.N., less agile, cannot. R.R. may/may not say, 'I promise, if you jump I will catch you'. If R.R. says it, P.N. will jump and R.R. may/may not catch him. If R.R. does not say it, P.N. will not jump. If P.N. jumps and is caught, he escapes. If P.N. jumps and is not caught, he is killed. If P.N. does not jump, he is captured by the posse and killed (probability: .5) or escapes (probability: .5). His beneficial reliance is the difference in dollars between u_2 (escaping) and u_4 (escaping with a probability of .5 or being killed with a probability of .5). His detrimental reliance is the difference between u_1 (= u_4 : escaping with a probability of .5 or being killed with a probability of .5) and u_3 (being killed).

B.

Goetz and Scott have a thesis. It is Thesis C of the introduction: *Only* the reliance interest counts. But Goetz and Scott interpret reliance so richly they have to choose among various ways to count it. We will wonder by late in Part IIC whether or not to describe the rule of *Enforcing Promises* by 'protecting the reliance interest as such'. Goetz and Scott and everybody else are after the "optimal damage formula" (for broken promises).¹²⁰ We will cut our teeth on this version of the formula: the "economic objective of regulating promises is to maximize the net beneficial reliance derived from promise-making activity."¹²¹ Expressed this way the formula is not precisely right. We may speculate that the mistake is inadvertent. The passage I quote appears in the conclusion of *Enforcing Promises*, when Goetz and Scott (conceivably the reader too) are tired, and possibly they are inattentive. Instead, they may know what they are doing and be arguing enthymematically—suppressing a premise. At least they do not pursue this version of the formula in the body of the paper where they seriously commit themselves. But starting here lets us approach the true and beautiful gradually enough not to be overcome by it.

Net beneficial reliance (NBR) is a quantity of money, not an activity. To calculate it, we weight Y 's detrimental reliance and beneficial reliance by

120. *Id.* at 1277.

121. *Id.* at 1321.

the respective probabilities that they will be realized and subtract the one from the other. The formula is familiar from estimating expected utility in other contexts. Paradigmatically, if we win \$1 if a tossed fair coin comes up heads and \$0 if it comes up tails, expected utility is $(\$1 \times .5) + (\$0 \times .5) = \$.50$. We multiply each possible outcome by its probability and add the products. The formula in the context of *Enforcing Promises* is $pB - (1 - p)R$. Here 'B' and 'R' represent gross beneficial and gross detrimental reliance respectively; 'p' represents the probability Y will keep the promise. Because Y must keep the promise or break it, and the probability of a certainty is 1, the probability he breaks it is $1 - p$. Imagine that the probability Y keeps the promise in the hypothetical about the cake from Part IIA is .8. X's net beneficial reliance is then $(.8 \times \$3) - (.2 \times \$6) = \$1.20$. Also if the probability R.R. performs is .5, P.N.'s net beneficial reliance is 0 because the probability of escaping and that of being killed are both .5 whether or not the promise is made.

The first significant point is that protecting the expectation interest of the promisee, the normal remedy, has, Goetz and Scott believe, just about nothing to do with *any* objective of theirs. They say that by "imposing a sanction in excess of the social costs of breach," protecting the expectation interest "overdeters socially useful promising, except in competitive markets in which expectation is equivalent to reliance."¹²² E.g., the expectation interest of X in the opening illustration from Part IIA is \$50. We would expect the reliances, or the reliances added together, to be significantly less. Evidently, Goetz and Scott are calculating what is socially useful differently than I did in Part I. But the interpretation of 'expectation interest' is less straightforward later.

Net beneficial reliance is obviously a good thing and it is better, *ceteris paribus*, to have more of it. As I say, Goetz and Scott misleadingly speak of maximizing it. We will call it a 'target variable', adopting the language of the theory of economic policy.¹²³ We can determine or affect the value of a target variable and this value matters to us for itself. Imagine Y makes a particular promise. B and R, as above,¹²⁴ are X's beneficial and detrimental reliances in this promise; p is again the probability Y will keep it. Some promises, those having pB greater than $(1 - p)R$, increase NBR, taken across the entire social unit. Others, those having pB less than $(1 - p)R$, diminish it. B and R depend on what X does, i.e., if and the extent to which she relies or is going to rely. We are going to pretend B and R are constant for a particular promise. This is mildly unrealistic, because X's reliance may

122. *Id.* at 1297.

123. K. FOX, J. SENGUPTA & E. THORBECKE, *THE THEORY OF QUANTITATIVE ECONOMIC POLICY WITH APPLICATIONS TO ECONOMIC GROWTH AND STABILIZATION* 20-51 (1966).

124. See *supra* notes 121-22 and accompanying text.

well depend on what we do to Y if he breaks this promise; X knows that our sanctions will affect p . But what is analytically interesting in this variability of B and R has been expressed elegantly by Farber.¹²⁵ For our different purposes the world is complicated enough without taking this variability into account. Nevertheless we are going to let p , a disposition of Y , vary. That it does will be significant because we will want p or something like it to be a target variable by the time we get to Part IID.

We get to manipulate D (damages), what Y pays X if Y breaks his promise. Call D an 'instrument variable'. The idea is to manipulate instrument variables to get ideal values of target variables. If we change D , we do two things. We change p in the direction we change D . We are less likely to break a promise if we are going to be shot for breaking it. Let n be the number of promises made. We change n in the opposite direction. We are also less likely to make a promise if we are going to be shot for breaking it (anyway if the promise is gratuitous—we investigate in Part IID whether Y is willing to risk being shot for a price).

Pretend n is constant. Then NBR will vary directly with p and we could maximize it by setting D as high as we can (e.g., death by slicing). Nevertheless n would decline. NBR is 0 if nobody promises. So we start increasing D from 0 and get changes in p and n pushing NBR respectively up and down. Ideally we increase D until the effects of the changes offset each other and we stop, maximizing NBR there. But this will not work because there is no systematic relation between whether a promise is made and its NBR. Let e be a small increment. Increasing D by e might lower NBR, increasing D by $2e$ might raise it, increasing D by $3e$ might lower it, etc.

This is not a big thing. As Goetz and Scott attest in the body, but not the conclusion, of their paper, their damage rule is intended "to deter" not those promises reducing NBR, but "all promises with net social costs," and to "encourage" not those promises increasing NBR, but "those with net benefits."¹²⁶ (D , being a penalty not a subsidy, does not encourage any promise, supposing 'encourage' is used ordinarily.¹²⁷) They say, too, "optimization is defined as maximizing the net social benefits of promissory activity—that is, the benefits of promises minus their costs."¹²⁸

To maximize NBR by itself, however, is bad because not only the (expected) satisfaction of the promisee ($pB - (1 - p)R$) but also the satisfaction of the promisor (G) matters. If we maximize NBR we maximize net social benefits just in case the promisor is indifferent prelegally between

125. Farber, *supra* note 85, at 306–10.

126. Goetz & Scott, *supra* note 2, at 1281.

127. See *supra* notes 114–15 and accompanying text.

128. Goetz & Scott, *supra* note 2, at 1274.

making and not making the promise. That the promisor is thus indifferent is the premise *Enforcing Promises* perhaps suppressed. That the promisor ordinarily is not thus indifferent is why D, if we calculate it independently of G, does not regiment X's promises so that X makes them in order of declining contribution to the community.

The rule Goetz and Scott provide is complicated, but makes sense. I set it out, and after a remark about p , explain it.

$$(1 - p)D = (1 - p)R - pB$$

Calculating p , the probability Y will not breach, presents a bit of a problem. The problem is p is not observable. Goetz and Scott direct us: "Let p be the promisor's reasonable, subjective assessment of the probability that he will perform a promise under an existing legal rule calling for damages of D in the event of breach."¹²⁹ This is a mouthful and signals their distress. It is difficult to identify p and damages depend on it. I do not object to having damages depend on p or to the way Goetz and Scott calculate it. A judge estimating it is going to get it wrong a lot. But if X does not believe the judge is going to get p wrong *systematically*, the formula still works. Yet, if a different rule were to come along that did not require p , and were otherwise as good, I would rather use it (it is going to come along). Imagine asking Y about this probability. He will not divulge it and, even if he were willing to divulge it, it might not exist (for example, if in the individual instance 'reasonable' is incompatible with 'subjective'). Because *tu quoque* arguments are inherently ineffective against bystanders, the reader should not give me leave to do what Goetz and Scott do; nevertheless, I will be marginally more inclined to request similar calculational concessions of the reader than I would be had Goetz and Scott restricted themselves to observables.

Inspect the right side of the damage equation first. It specifies just negated NBR. We may, if we wish, call this 'net detrimental reliance' (NDR). It is the expected *disvalue* of Y 's promising to X . Depending on which of detrimental reliance and beneficial reliance, weighted by their probabilities, predominates, NDR is positive or negative. The left side of the equation directs us to multiply damages (D) by the improbability of Y 's having to pay them ($1 - p$).

Simply put, Y is just trying to be happy. Maybe a way to do this is to promise X something. Accordingly, Y promises if he figures *he* will be made happier by this. We are just trying to make everybody happy. We can do this—admittedly in a small way—by getting Y to promise X something just in case the *community* gains by it. The community for purposes of private

129. *Id.* at 1281.

contract is X and Y . (If Z is going to be hurt too badly by their agreement, then what X and Y have is not a contract but an illegal bargain. For convenience I disregard third-party beneficiaries. The law usually does this too for the identical reason, calling them 'incidental'.) We internalize to Y the cost to X of what Y does. We do this to induce Y to act not only for his own well-being, but for X 's also. By doing so, Y will maximize the community's satisfaction instead of his own. The cost to X of Y 's promising is $(1 - p)R - pB$. We intend to impose this cost on Y at the time of his promising. Because Y may not break his promise, we cannot simply equate damages to this. If the probability is p that Y will keep the promise, Y can expect to pay $(1 - p)D$ if he does not keep it. We are required to set D equal to the cost we want to impose, divided by $1 - p$, if we are to impose this cost.

We can do other things using this technique. I.e., we can maximize NBR by getting Y to promise X something just in case X gains by it. We do this simply by adding 'G' to the right side of the equation Goetz and Scott give us. The equation, as they write it, gets Y to take account of X 's satisfaction besides Y 's own. The revised equation then factors out Y 's own satisfaction. But as I said we do not have a reason to do this.

In a restricted way, Goetz and Scott are exactly right. Their rule discourages every promise that should not be made. Imagine Y contemplating promising X something in a situation in which Y 's doing so has a negative NBR (positive NDR). We want him to promise just in case his advantage from doing so is greater than X 's expected loss. Then, on balance, there is social gain. Y should subtract the cost to X of Y 's promising, $(1 - p)R - pB$ from his own gain G from promising. He should promise depending on the sign of what is left. *Enforcing Promises* gives a rule that gets him to do this. With it Y is looking at having to pay $((1 - p)R - pB)/(1 - p)$ with a probability of $1 - p$. Y , by doing the best thing for himself, will do the best social thing too.

I will make a few qualifying remarks still in the spirit of Goetz and Scott. We must keep in mind that they are talking consistently about the benefits of promising, not of performing promises. Evidently, it is often socially good for Y to give something to X —i.e., if X would get greater satisfaction from having it than Y . Promising to give it is a move toward giving it, but Goetz and Scott are not celebrating it as such. Also, their rule does not do anything affirmative to encourage Y to promise in circumstances where it is socially valuable to do this. It just does not get in his way. Imagine it would be *extremely* advantageous to X to know that Y will do something, but Y is *marginally* better off if he does not promise X he will do it. I.e., $(1 - p)R - pB$ is large and negative while G is small and negative. Y , if he regards only his interest, does not promise and the rule does not get him to.

What Goetz and Scott do is innovative in three respects. They apply (something in the neighborhood of) a reliance measure more promiscuously than anybody else. Fuller may be read to have done the same thing but, as I have said, he was probably more cautious. They determine detrimental reliance differently than does anybody else. But they are exactly right here. Also, having committed themselves to applying a reliance measure, or something like it, and having constructed the correct measure of detrimental reliance, they do not less interestingly simply give *X* the detrimental reliance under that measure. To see the difference, we divide (as do they) their damage equation by $(1 - p)$:

$$D = R - (p/(1 - p))B.$$

That is, they fall short of giving detrimental reliance, as they correctly calculate it, by $(p/(1 - p))B$. Goetz and Scott call $p/(1 - p)$ the 'good-faith ratio' and a use of it to reduce *D* below *R* a 'damage offset'. They speculate: "[T]he good-faith ratio and the damage offset suggest a possible explanation for the language of the *Restatement of Contracts*, which conditions both the enforceability and the magnitude of reliance-based sanctions upon the 'requirements of justice.'"¹³⁰ The expression 'possible explanation' is equivocal here. If Goetz and Scott believe the writers of the present *Restatement* contemplated ratios and offsets when they added the concluding sentence to section 90, Goetz and Scott are being engagingly modest. The rule of liability belongs to *Enforcing Promises*; the present *Restatement* probably intends less ambitiously just to withdraw in an orderly way from the Willistonian position that a court must protect the expectation interest in a contract or nothing. Nevertheless, the rule of liability may explain, in the sense of 'justify', this sentence. Probably it does not though. As the *Restatement* uses it, 'justice' likely evokes an Aristotelian/Fullerian concern for compensating *X* which the damage rule of *Enforcing Promises* does not do.¹³¹ "A damage offset based on the good-faith ratio and on the amount of potential beneficial reliance," Goetz and Scott contend, "will encourage the optimal quantity and quality of promises by reflecting in the promisor's decision calculus both the harmful and beneficial effects of his promise-making."¹³² I will argue, mostly in Part IID, that the rule of *Enforcing Promises* gets the quantity right and the quality wrong.

130. *Id.* at 1283.

131. See *infra* Part IIC.

132. Goetz & Scott, *supra* note 2, at 1282–83.

C.

To motivate their damage rule, Goetz and Scott talk tort law to us, not contract law. They claim their “approach is equivalent to the balancing of prospective costs and benefits under the widely accepted Learned Hand test for the required duty of care in potential tort-producing activities.”¹³³ The Hand test as they state it results in “an actor[’s being] guilty of negligence if the loss caused by the accident multiplied by the probability of its occurrence exceeds the burden of taking adequate precautions.”¹³⁴ *Enforcing Promises* continues, reinforcing its analogy, “there are strong theoretical parallels between the production of dangerous, but useful, products and the making of promises.”¹³⁵

We will make up a story about a possible tort to test this claim, without first taking time to get clear concerning what ‘equivalent’, as Goetz and Scott use it, comes to. Also, to firm up what Hand was talking about, we will parody his test. We do this despite a definition of love being never having to apply the Hand test. Pretend Poncho loves Alice. From his point of view, things are going badly. Alice is married to Steve; they have four children; nobody is getting any younger; etc. Poncho has trouble just seeing Alice. Alice regularly runs early in the morning. Poncho is a scholar instead of a runner; but he can see her if he gets up early and drives past her while she runs. To decide if he should do this, he applies the Hand test. He really enjoys just *looking at* Alice. He knows he might accidentally hit her, albeit he drives cautiously, etc.—this could occur if, on seeing her, he is overcome with excitement. But Poncho reasonably estimates the probability of hitting her is low. The cost of taking adequate precautions is his sleeping late—giving up seeing Alice, a significant loss to him and so to society. He rightly decides to drive past Alice, but just three times a week. (It gets boring at the margin as he drives past more often; thus, he sets a limit to his love and beyond a particular frequency the Hand test tells him to sleep late.) Eventually, however, he hits Alice and injures her. He is not liable to Alice according to the Hand test, because the burden of taking adequate precautions to prevent the injury is greater than the cost of the injury, discounted by its improbability.

Evidently the rule Goetz and Scott give us is equivalent to the Hand test in that these get the number of promises/drives right. Nevertheless, a lot is built into ‘accidentally’. We begin to unpack it as ‘not being (further) responsible’. However, imagine that Poncho, while calculating, realizes he might *decide* to drive into Alice—things as I say are bad. When Poncho

133. *Id.* at 1274–75.

134. *Id.* at 1275 n.34.

135. *Id.* at 1275.

takes account of the improbability that he will commit a battery, the calculus still says 'Drive'. Unexpectedly, one day he does hit her on purpose and injures her.

Or imagine Alice divorces Steve. He has been making the world better off by consorting with Elizabeth who does not run but lies around looking sultry. Alice is going to decide about marrying Poncho who is more than willing. Alice applies the Hand test. She knows wives occasionally kill their husbands and their doing this *at least* breaks the marriage contract. But her "reasonable, subjective assessment of the probability" she is going to kill him gives a low value. The cost of preventing the injury is not marrying. She immodestly but rightly believes it substantial—life is not worth much to Poncho without her. As to the magnitude of the injury, Alice thinks, if things go badly, Poncho's being dead will not be a *big* loss to Poncho or to anybody else. She marries him. Unexpectedly, Poncho also gets interested in Elizabeth; so, Alice decides to kill him, which she does.

Disregard the criminal law. It is not at present doing anything to interest us. Either it is distributive, rather than allocative (keeping intentional killings, etc. out of the free market by not permitting us to buy them by paying tort damages); or it encourages us to make contracts rather than commit torts, where we might do either (advantage: a jury has to guess at the value of a tort to the injured party but by contracting she partly reveals it).

There is a *vast* difference in tort law between the case in which Poncho drives into Alice accidentally and the cases in which Poncho does this intentionally and in which Alice kills Poncho intentionally: their acting as the Hand test directs absolves them only in the first. I.e., the Hand test is otherwise ordinarily insensitive to deontological (noneconomic) nuances, but it distinguishes between being stumbled over and being kicked. So 'accidentally' is translatable as 'not as a consequence of a (new) decision about behaving'. This perhaps is not a big advance over the last reading because 'decision' might end up getting defined using 'responsibility'. But for our purposes in applying the Hand test, we may legitimately take deciding as a datum. The Hand test does not apply to next to last decisions. Neither does it apply to intentional torts.

Holmes: "I take it that a man may bind himself at law that any future event shall happen."¹³⁶ Also: "Any present fact which is unknown to the parties is just as uncertain for the purposes of making an arrangement at this moment, as any future fact."¹³⁷ I.e., *Y* promises *X*: 'Your ship will come in'; but it has already sunk. Most promises differ from this in two respects. They are broken only intentionally and only after they are made. That is, promise-

136. O.W. HOLMES, THE COMMON LAW 299 (1881).

137. *Id.* at 304.

breaking is infrequently accidental in the appropriate sense. The contracting situations *Enforcing Promises* treats are more nearly equivalent to Poncho *deciding* to hit Alice, etc., than to Poncho accidentally hitting Alice—just the situations in which the Hand test does not apply.

Mostly, we use the Hand test to find *if* a defendant is liable, not *how much* he has to pay. The Hand test is about motive, not measure, in the language of Part IA. The rule requires that *Y* compensate *X* for the *actual* harm he does (only) if there is net *expected* harm. Imagine that a doctor administers a drug knowing, or having reason to know, it will do his patient \$500 harm or \$400 good with probabilities of .5. The doctor is negligent according to the Hand test, but not *very* negligent: $\$500 \times .5$ is more than $\$400 \times .5$, but not a great deal more. If the bad outcome occurs (as it is going to half the time) the doctor must pay \$500. The idea is that, having established the fact of liability, we want to set the extent of it so that we place the injured party in as good a position as she would have been if she had not been injured. If we apply the rule of *Enforcing Promises* we give her $\$500 - (.5/(1 - .5))\400 : that is, \$100.

To perform a Hand test in a context of promising, calculate *G*, the gain to the *promisor* from making the promise (again not from giving what he promises). The promisor's foregoing *G* is part of the cost of preventing the harm. Hold him liable *only if* the harm discounted by its improbability $((1 - p)R)$ is greater than the cost of preventing it $(pB + G)$. Promising, in these circumstances, is the negligent act and liability follows from it if there is injury, as generally there will be if the promisor breaks the promise. The rule of *Enforcing Promises* persuades the promisor to balance $(1 - p)R - pB$ against *G* to achieve the same promising activity. A promisor indifferently adds *pB* to *G* or subtracts it from $(1 - p)R$. By the rule of *Enforcing Promises*, but not by the Hand test, frequently (i.e., if *D* is positive) there is liability if the promise is broken, even if it ought to have been made. This happens because, despite *D*'s being positive, the promisor gets offsetting gains. Also, by the Hand test the promisor *if* liable is required to pay not $R - (p/(1 - p))B$ as *Enforcing Promises* has it, but *R* undiscounted. Both rules get the number of promises made right. However, the Hand test does and the rule offered by *Enforcing Promises* does not—except where *p* or *B* is zero—fully compensate the promisee (if compensating comes to protecting the reliance interest; but, it comes to at least this; and, if it comes to more, neither standard compensates).

We can look differently at the difference between what *Enforcing Promises* tells us to do and the true analogue to the Hand test. The new perspective reappears more importantly later. *D* ought to do two things (at least). It ought to get the number of promises right. But for the various reasons that support tort law generally (and because of the historical

antecedents of the rule of *Enforcing Promises* in Fuller's Aristotelian ethical intuitions) it should also put X where she would have been had Y not promised. Therefore, there are two target variables: n and say c (the ratio of X 's recovery to X 's reliance loss, optimally 1). Goetz and Scott provide one instrument variable (D) to optimize the values of both target variables. In the ordinary course of things, they can get only n or only c absolutely right or they can get n and c partly right. This is because an instrument variable has only one value at a time, but, in general, different values of it optimize different target variables. Goetz and Scott apply it to satisfy n . But the Hand test would bifurcate the instrument variable (divorcing the decision to impose liability from how much liability gets imposed) to apply its parts to optimize the values of the target variables independently. The Hand test is distinguishing between what Fuller called 'motive' and 'measure'; but, here, the context makes this a good thing.

Goetz and Scott started with Fuller, but by now have gotten far from him. Goetz and Scott want, as Fuller wanted, to protect the reliance interest, but for different reasons. According to Fuller (following Aristotle), protecting the reliance interest gives X what Y caused X to lose. This is corrective justice. According to Goetz and Scott, protecting the reliance interest gets the number of promises Y makes right. This contributes to efficiently allocating resources. But then Goetz and Scott omit from their argument the solicitude for X that is significant for Fuller. Because they protect X 's reliance interest only incidentally, they treat X not as a (Kantian) end, as she is for Fuller, but as a means. Consequently, the continuity of their analysis with Fuller's in which Goetz and Scott so rejoice is mostly spurious.

Before Goetz and Scott wrote, we defined the reliance interest as and measured recovery by detrimental reliance. Postanalytically, what is changed is the definition of 'detrimental reliance'. Now we know what it really is. Goetz and Scott, nevertheless, did not disconnect 'detrimental reliance' from 'reliance interest'. We expect to go on measuring the reliance interest by detrimental reliance; it is just that our idea of the latter is different. However the rule *Enforcing Promises* advocates does not protect X 's reliance interest as we thus have consistently understood it. Instead, it protects this interest, diminished by the authors' particular function of X 's beneficial reliance ($(p/(1 - p))$ —). Nothing is, by itself, wrong with arguing this way. The rule of *Enforcing Promises* does excellent things too. It is just that they are other things. The difference between being Kantian (Fuller) and non-Kantian (Goetz and Scott) is a big one.

D.

Getting the correct number of promises made is the equivalent in contract jurisprudence of getting things worked out in a fairy story (princess awake;

prince not a frog; etc.). The performance part, as *Enforcing Promises* portrays it, is analogous to marriage in the story. It is the unexamined telos. The story concludes, 'and they lived happily ever after'; Goetz and Scott rather conclude, 'and they lived happily ever after with probability p '. It is not wholly redemptive that their version, being probabilistic, is less trusting.

We can see something is wrong, if we work out further the examples at the end of Part IIA. Imagine the probability Y will give X the cake is again .8. Then D is negative (-\$.20). This does not indicate that the court will subsidize Y 's promising, but just that it will impose no damages. Y may break his promise with impunity. But we intuit that there should be *some* disincentive to his so doing. Again, if R.R. will keep his promise to catch P.N. with a probability .5, then D is 0. There is no gain to P.N. and, *ceteris paribus*, no social gain from R.R.'s promising. After P.N. jumps (relies), it is important to him and, depending on the social product of acting or banditry, important to the community that R.R. catch him, although the rule of *Enforcing Promises* would not give damages to P.N.'s estate if R.R. does not. But P.N.'s expectation interest is the value of his life; and he has relied to the extent of half this.

That is, it matters whether a promise is kept (presuming it has been made). Whether it is kept depends on the damage rule (p depends on D). Goetz and Scott recognize this by defining p "under an existing legal rule calling for damages of D ."¹³⁸ I argued a bargained-for promise is kept when it should be kept and broken when it should be broken if the damage rule protects the expectation interest because its doing this is economically efficient.¹³⁹ I will disregard this argument, attending only to promises only relied on (not bargained for), or accepting, for its heuristic advantage, the contention of *Enforcing Promises* that we should not protect the expectation interest in either bargained-for promises or relied-on promises. If everything goes well, we will end up protecting the expectation interest anyway, or trying to do so.

Pretend Y has made a (gratuitous) promise to X . By the background psychological theory, Y will break it just in case he gains by doing this. We want him to break it just in case society gains. Society gains just in case X and Y together have a net gain. Relevantly, this happens when Y 's gain offsets X 's loss. Imagine we have identified X 's loss from Y 's breaking his promise. If we attend only to Y 's promise breaking (thus not to his promise making) we should equate D to this loss to force Y to take it into account as he calculates what to do. But the character of X 's loss is opaque even after excluding expectancy losses. We narrow it down to something like the

138. Goetz & Scott, *supra* note 2, at 1281.

139. See *supra*, Part ID.

reliance interest by stipulating we will not *compare* what X would do with what Y has promised her with what Y would do with it. We nevertheless identify two candidate rules, starting from different ideas of this loss.

Rule R : Y having breached, we might give X her detrimental reliance, the difference between where she is now and where she would have been *had Y not promised*: R in the notation of *Enforcing Promises*. It would be convenient if this *were* right. The *Restatement* defines “detrimental reliance” by this difference. If we are trying to protect the reliance interest, arguably we should give exactly this difference (R). In the language of Part IIC and the latter part of this Part, if we do give R , we obtain the value 1 (its optimal value) for c . But, under a rule requiring that Y do this, seemingly Y will break promises he should keep.

Rule $R + B$: We might give X her detrimental reliance *and* her beneficial reliance. This may be read off figure 1 in Part IIA and the following matrix as the difference between u_3 and u_1 plus the difference between u_4 and u_2 . Equivalently, it is the difference between u_3 and u_2 , less the difference between u_1 and u_4 . If Y 's gain by breaking the promise is greater than R and less than $R + B$, a rule using R encourages Y to break his promise while a rule using $R + B$ encourages Y to keep it. The rules otherwise provide identical results. So one rule is better than the other, depending on whether Y ought to keep or break his promise in these circumstances.

Goetz and Scott guide us only uncertainly here. At first we think they would want Y to break the promise: R is the most *Enforcing Promises* is willing to give in *any* circumstances (and then only if p or B is zero). But we do better reading its analysis as supporting the opposite (correct) result. In telling us how to optimize the number of promises made (n) Goetz and Scott say beneficial reliance is good and detrimental reliance bad. They remain respectively good and bad if, instead, we optimize the number of promises kept. Perhaps we should talk of optimizing p here. Nevertheless, ‘ p ’ is not precisely the right variable because it is not constant over promises and collapses after the fact to 1 or 0. I use ‘ k ’ (the number of promises kept). X 's not getting B is a loss to the community in a more attenuated sense than X 's suffering R . But relative to getting B , it is a loss in the broad sense of ‘loss’, which reports results of comparing sums of satisfactions of individuals in different situations.

A rule giving $R + B$ at least does more than protect X 's reliance interest (defined as detrimental reliance). We should, in general, distinguish a reliance interest from an expectation interest according to this test: something is a reliance interest if we calculate it against the way things would have been if Y had *not made* the promise, an expectation interest if we calculate it against the way things would have been if Y had *kept* it. Then the rule giving $R + B$ gives expectation damages (or part of them). This result

ought to be mildly embarrassing to a thesis that only the reliance interest counts, but Goetz and Scott can live with it.

Begin with D , as Goetz and Scott have it, at $R - (p/(1 - p))B$. If we increase D slightly, Y will make slightly fewer promises. Nevertheless, he will keep more of them (p will go up for every promise made). The consequent gain will exceed the loss unless the dependencies of n and k on D are pathological. This is because D , being set to get the number of promises made right, badly underproduces promises kept, so that not just the promises it is marginally beneficial to keep are broken. In changing D , we give up made promises barely good enough to encourage anyway (having $G - (1 - p)R + pB$ close to 0) in exchange for kept promises having gains approaching $G + R$ less $R - (p/(1 - p))B$. This is the amount by which D understates the cost of breaking them. Imagine, in the last illustration of Part IIA with $p = .5$, we increase D slightly from $R - (p/(1 - p))B = 0$. R.R. might behave differently in either of two ways. He might be deterred from promising—bad because before we increased D he was promising optimally. Or, having promised, he might be deterred from breaking the promise—good because before we increased D he was performing too infrequently. Neither effect is *a priori* more probable than the other. Loss from not making the promise is almost 0, gain from keeping it close to $R + B$, the value of P.N.'s life. So it pays to increase D .

Or begin with D at $R + B$. If we decrease D slightly, Y will make more promises but keep fewer of them. The promises newly broken are marginally valuable. But the promises newly made are advantageous ones—the value of them to the community will approach the difference between the prospective costs of promising under alternative rules, $(1 - p)(R + B)$ and $(1 - p)R - pB$. This is B . Imagine in the last illustration of Part IIA we decrease D slightly from $R + B$. R.R., not having promised, might do so now (good). Or, having promised, he might now break the promise (bad). Breaking the promise is not all that bad, not because the loss to P.N. is somehow diminished, but because R.R., having to pay for almost all of it, will break the promise only if doing so otherwise significantly benefits him. The good effect is greater than the bad and neither is evidently more probable. Consequently, it pays to decrease D . I.e., neither optimizing n nor optimizing k is likely to give a combination of values for both variables that is best.

In the neighborhood of promising we have three target variables: the number of promises made (n); the proportion of her loss for which X is compensated (c); and the number of promises kept (k). Despite this we have only one instrument variable (D). We know we are not going to get everything we want, unless fortuitously. *Enforcing Promises*, by setting D at $R - (p/(1 - p))B$, gets n right but exhausts D without doing anything

directly about c or k . We might instead optimize c by setting D at R (assuming, with Fuller/Aristotle, that awarding detrimental reliance precisely compensates X). Although doing this has other advantages we will get to, it correspondingly leaves n and k at risk. Or finally, we might get a better level of k by setting D at $R + B$ —but at a price of not optimizing n and c . Evidently, the cost of getting any of n , c , or k right is getting generally wrong values of the other two.

To start with, we ignore c , partly because we talked about it in Part IIC. A way to get n and k right together is to introduce a second instrument variable besides D so there is one for each of these target variables. D is only awkwardly usable to get the right n , although Goetz and Scott use it only for this. Using it so makes their formula more interesting by its having D multiplied by $1 - p$. But mainly this shows they are applying the instrument variable at the wrong time: at the time of making, not at the time of breaking, the promise. D is aesthetically and pragmatically suited to control k because we apply it only when Y breaks his promise. Therefore, we first set D at $R + B$ to get k right, and then consider what we have to do to get n right, too.

We will do whatever else we decide to do at the point a promise is being made or not. At this point Y should, as Goetz and Scott say, be looking at a gain from promising that is independent of the legal rule, reduced by the law-imposed expected cost $(1 - p)R - pB$, so he will consider the consequences to X . If we have already set D to optimize k , this prelegal gain is instead reduced by $(1 - p)(R + B)$. That is, what Y pays, if he breaks the promise, multiplied by the probability he will break it. So we should subsidize Y 's promising by paying Y , if he does promise, the difference between these quantities, that is, $(1 - p)(R + B)$ less $(1 - p)R - pB$. This works out to B . Subsequently, we ought to do nothing, if Y keeps his promise. But if he breaks it, we ought to take $R + B$ from him. Y should do the right thing both times then: promise if he should and keep his promises if he should.

Intuitively, we *start out* supposing (acting as if we suppose) Y will keep his promise if he makes it ($p = 1$). To get him to make it in exactly the cases he should, we pay him for the benefit (B) conferred on others (X) by his having made it. *Subsequently*, to get him to keep it in exactly the cases he should, we take from him, if he breaks it ($p = 0$), the loss ($R + B$) to others (X) of his breaking it.

A difficulty is that we are incurring a deficit. We (the nonparties) are paying out B to Y and taking in nothing. On the other hand, X obtains $R + B$ if Y breaks the promise. All we are trying to accomplish for X is to make her as well off as she would have been if Y had not promised; we can do this by setting damages at just R . We are less interested in giving B to X

than we are in taking it from Y . We therefore might partly fund the subsidy (to the extent of $(1 - p)B$) by diverting to it the B part of what otherwise would be X 's damages. Our doing this still would give the optimal value (1) for c so X is not left badly off (assuming again X 's recovering detrimental reliance exactly compensates X).

Subsidizing is a bad idea because it is a great nuisance (i.e., transaction costs are high). The picture is Kafkaesque. We imagine a bureau of promises. A potential promisor submits a possible promise to it. A functionary calculates the subsidy B for this promise. Depending on B and G the potential promisor promises and is subsidized or does not promise and is not subsidized. There are two major problems: (1) only part of the cost of subsidizing will be collected in damages and (2) X 's beneficial reliance is difficult to calculate. It is not even as if we could find this out by asking X , because there would be motive for her to collude with Y to inflate B . I let the inconvenience or impossibility of subsidizing sink in while exploring an alternative to it.

Imagine, then, we have only one instrument variable, i.e., *all* we can do is manipulate D . Then we locate D somewhere between $R - (p/(1 - p))B$ and $R + B$: we take a linear combination of the rule that optimizes n and the rule that optimizes k . With a not less than 0 nor greater than 1, we set:

$$D = a(R - (p/(1 - p))B) + (1 - a)(R + B).$$

The best a will not be 1 (its being 1 would give us the rule Goetz and Scott advocate which gets n right but costs too much in k). Identically, it will not be 0 (this would give too few promises made). However, we do not have a convenient way to find out just where between 0 and 1 it is. Bernoulli's principle of insufficient reason (which is not the best principle in the world but may be the only principle we can grab onto here) tells us that if we do not know which of two outcomes will be realized, we should assign each a probability of .5.¹⁴⁰ If we are ignorant about Y 's promise-keeping we might set p at .5. Then we might set D at R because this is intermediate between $R - B$, which we get if a is 1, and $R + B$, which we get if a is 0. To do this, we set a at .5, which is also applying Bernoulli's principle, albeit probably even less justifiably than usual. A nice thing about this result is that it optimizes c (again assume compensating is giving detrimental reliance). This is being as elegant as we can be, but still is merely making the best of a bad thing.

Goetz's and Scott's analysis does not apply well to relied-on promises that are not bargained for (i.e., gratuitous promises: Goetz's and Scott's

140. R. LUCE & H. RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY 284-86 (1957).

paradigmatic case). *Y* is hypothetically thinking about promising to *give X* something. And by manipulating *D* we are trying to induce him to promise optimally frequently. Given *Y*'s promise is not going to be bargained for, *Y* must be well-disposed to *X* before the law operates on him. *D* functions by taking something from *Y* and giving it to *X*. This is just what *Y* will have decided to do anyway, if he promises. Then, increasing *D* should not have its ordinary effect, or not so much of it. *Y* might reduce the magnitude of his promises, not their number. Anyway we should not expect *Y* to feel *very* bad if he is made to give *X* more. There is incongruity because, according to Goetz and Scott, the law comes into play only if *Y*'s promising hurts *X* on balance; and *Y* is often *X*'s friend.

Also, we may count *X*'s interest twice. *Y* probably has a lot of reasons to promise to give something to *X*, but the best or most ordinary is that *X*'s satisfaction matters to *Y*. That is, *Y*'s utility function depends on *X*'s. Maybe we do not want to get *Y* to internalize *X*'s satisfaction *again* by forcing him to figure in damages to *X* consequent on *Y*'s breaking the promise. One responds: *Y*'s happiness, caused by *X*'s happiness, is a social gain separate from *X*'s happiness; also, *Y* already is interested in *X*'s happiness and, consequently, is (somewhat) happy to pay damages to *X*. However, by including vicarious utility in the calculus, we get rapidly away from the ostensibly sensible framework we started with. So, if *X* likes *Y* too, *Y*'s satisfaction is a function of *X*'s satisfaction, which is a function of *Y*'s satisfaction, etc. We could build up pretty high levels of satisfaction going on this way. Also, supposing *Y*'s satisfaction varies inversely, rather than directly, with *X*'s, what we should do is obscure. E.g., we might offset the harm of a maliciously made promise by the satisfaction of the promisor in breaking it. But it is not *at all* clear we want to do this.

Be this as it may, this response probably does not go as deeply as the trouble, which is really with the presupposed psychological theory—psychological egoism¹⁴¹—according to which it is incoherent to think that *Y* can consider *X*'s satisfaction without having this reflected in his own. By the theory, plausibly *Y* has an “interested but unselfish concern for the condition of” somebody; however, he must lack “a strictly disinterested concern.”¹⁴² We ask whether *Y* might conceivably act in *X*'s behalf without satisfaction or the prospect of satisfaction for himself from doing this. Probably he can. We imagine judges for whatever reasons (for the satisfaction of judging well) adjudicate disinterestedly. Or we construct liability rules disinterestedly. If we maximize satisfaction tautologically, Poncho can

141. See, e.g., Feinberg, *Psychological Egoism*, in *REASON AND RESPONSIBILITY* 498 (4th ed. J. Feinberg 1978).

142. N. RESCHER, *UNSELFISHNESS: THE ROLE OF THE VICARIOUS AFFECTS IN MORAL PHILOSOPHY AND SOCIAL THEORY* 9 (1975).

become liable under the Hand test (if he knows about it) only by calculating badly, not by disregarding Alice's well-being.

The analysis of *Enforcing Promises* arguably is inapplicable to promises bargained for. If we raise D , we increase the expense to Y of breaking the promise. Simultaneously, however, we increase the value of his breaking it to X by the same amount (in dollars). Therefore, Y can charge that much more (discounted by the improbability of breach) for the promise. Then, manipulating D gets us nowhere. This is the result of X and Y assigning identical probabilities to Y 's breaking his promise. If the probability Y assigns is higher, raising D discourages promising (then Y cannot recover completely his expected added cost); if the probability Y assigns is lower, raising D encourages promising (Y can recover more than his expected added cost). But these are weak and irregular effects to have a rule of damages turn on.

We left promises only relied on in bad shape. If we did not subsidize making them, we had too few made or too few kept (or both). And subsidizing them is not remotely practical. But thinking about promises bargained for tells us what to do. That is, the promisee is going to benefit by B if the promise is made and is, as well, the only person who has a good idea what B is. So she ought to provide the incentive to promising. Put differently, X , if she wants a promise that Y would not make otherwise, ought just to buy it by paying B to Y , or by paying something less than B that still exceeds Y 's cost of promising. We can get the right promises made without allocating to Y all the gain from them. X 's doing this transforms Y 's otherwise gratuitous promise into a bargained-for promise. We reinvent contract law (after a fashion). If we simply extrapolate from where Goetz and Scott have taken us, we reapproach the law as it was when they began to criticize it.

$D = B + R$, which is still the right rule, gives expectation damages manqué. We conclude close to *Anglia Television Ltd. v. Reed*, discussed in Part IB.¹⁴³ What is missing (again in terms of figure 1) is the difference between u_1 and u_4 , which may be 0, as in the last illustration of Part IIA. There $P.N.$ expects to live and, if $R.R.$ breaks his promise, is going to die. B and R are each worth a probability of .5 of living. $B + R$ falls short of expectation damages if the promisor is giving something independently of the promise (e.g., a cake). To this extent, D —defined $B + R$ —protects the expectation interest in promising, instead of performing. The 'reliance' in 'beneficial reliance' is misleading, in that we are trained to contrast it with 'expectation'. Nevertheless, the controlling idea is that the promisee

143. See *supra* notes 47–49 and accompanying text.

expects the benefit, albeit she has acted in reliance to put herself in the position to receive that benefit.

III. CONCLUSION

I have taken Goetz and Scott to argue for C: Only the reliance interest counts. I have been arguing *from* A/B: The expectation interest counts too/only. From this perspective what Fuller did best was open things up. And what Goetz and Scott do best is define 'detrimental reliance'. Simplified, A goes like this: there are two kinds of contracts: bargained-for and merely relied-on promises (*Restatement* view). We protect the expectation and reliance interests in them respectively. B has two plausible readings: B₁. Bargained-for and relied-on promises are contracts, but we protect the expectation interest of both (first *Restatement* view). B₂. Bargained-for promises are treated as in B₁. Relied-on promises are not contracts but potential torts; if broken, we give reliance damages.

B₁ is as bad as C is in the other direction. B₂ differs from A by how we define 'contract' and has the advantage of not being hubristic. Being hubristic gets one into trouble. Croesus asked the oracle of Apollo at Delphi what would happen if he attacked Persia, and got back the answer he would destroy a great empire.¹⁴⁴ He learned later it would be his own. Gilmore talks impressively about contract being absorbed by tort. "We are told that Contract, like God, is dead. And so it is."¹⁴⁵ Contract would appear more obviously alive (but less imperialistic) if we would define it in terms of the expectation interest and leave relied-on promises alone.

144. HERODOTUS, *THE HISTORIES* 60 (Revised A. Selin court trans. 1972).

145. G. GILMORE, *supra* note 4, at 3.

Glossary of Terms

Theses

- A The expectation interest counts too.
- B Only the expectation interest counts.
- B₁ Bargained-for and relied-on promises are contracts, but we protect the expectation interest of both (first *Restatement* view).
- B₂ Bargained-for promises are treated as in B₁. Relied-on promises are not contracts but potential torts; if broken, we give reliance damages.
- C Only the reliance interest counts.

Symbols

- a* a number between 0 and 1 inclusive, weighting the rules (formulae) that optimize *n* and *k*
- B gross beneficial reliance; the difference to the promisee between performance and promise + performance
- c* the proportion of her loss due to the promisor's breach for which the promisee is compensated
- D damages for breach of contract
- G the promisor's gain from promising
- k* the number of promises kept
- n* the number of promises made
- p* the probability the promisor will keep his promise
- 1-*p* the probability the promisor will break his promise
- R gross detrimental reliance; the difference to the promisee between nonperformance and promise + nonperformance
- u* utility
- X* the promisee (pronoun: 'she')
- Y* the promisor (pronoun: 'he')
- NBR net beneficial reliance ($pB - (1 - p)R$)
- NDR net detrimental reliance ($(1 - p)R - pB$)